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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

PHI, Inc., *et al.*,¹

Debtors.

Chapter 11

Case No. 19-30923-hdh-11

Jointly Administered

**STATEMENT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
IN OPPOSITION TO THE DEBTORS' ATTEMPTED RE-HEARING OF THE
COURT'S RULING ON MOTION OF THE DEBTORS PURSUANT TO 11 U.S.C.
§§ 363 AND 503 (I) AUTHORIZING THE DEBTORS TO IMPLEMENT KEY
EMPLOYEE INCENTIVE PLAN AND KEY EMPLOYEE RETENTION PLAN
AND (II) GRANTING RELATED RELIEF**

The Official Committee of Unsecured Creditors appointed in the above-captioned cases
(the "Official Committee") hereby files this its *Statement of the Official Committee of Unsecured*

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: PHI, Inc. (5707), PHI Air Medical, LLC (4705), AM Equity Holdings, L.L.C. (0730), PHI Tech Services, Inc. (5089) and PHI Helipass, L.L.C. (4187). The corporate headquarters and the mailing address for the Debtors listed above is 2001 SE Evangeline Thruway, Lafayette, LA 70508.

Creditors in Opposition to the Debtors' Attempted Re-Hearing of the Court's Ruling on Motion of the Debtors Pursuant to 11 U.S.C. §§ 363 and 503 (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and Key Employee Retention Plan and (II) Granting Related Relief (the "Statement in Opposition"). In support of the Statement in Opposition, the Official Committee respectfully states as follows:

BACKGROUND INFORMATION

1. On March 22, 2019, the Debtors filed their *Motion of the Debtors Pursuant to 11 U.S.C. §§ 363 and 503 (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and Key Employee Retention Plan and (II) Granting Related Relief* [Docket No. 108] (the "Employee Incentive Motion").

2. The United States Trustee filed the *United States Trustee's Objection to Motion of the Debtors Pursuant to 11 U.S.C. § 363 and 503 (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and Key Employee Retention Plan and (II) Granting Related Relief* [Docket No. 186] (the "U.S. Trustee Objection").

3. On April 12, 2019, the Debtors and the Official Committee filed the *Joint Stipulation Between Debtors and Official Committee of Unsecured Creditors Regarding Extension of Objection Deadlines for and Notice of Continuance of Hearing on Certain Matters Scheduled for Hearing on April 15, 2019* [Docket No. 236], in which the Debtors and the Committee agreed to bifurcate the hearing on the Employee Incentive Motion with respect to the Key Employee Retention Plan (the "KERP") and the Key Employee Incentive Plan (the "KEIP") and adjourn the hearing on the Employee Incentive Motion with respect to the KEIP to April 29, 2019.

4. On April 15, 2019, the Bankruptcy Court held a hearing to consider the Employee Incentive Motion with respect to the KERP only. On April 16, 2019, the Court entered its *Order*

(I) *Authorizing the Debtors to Implement to Key Employee Retention Plan and (II) Granting Related Relief* [Docket No. 260], which granted the Employee Incentive Motion with respect to the KERP and adjourned the hearing on the Employee Incentive Motion with respect to the KEIP to April 29, 2019 (the “KEIP Hearing”).

5. The Official Committee filed its *Objection and Amended Objection of Official Committee of Unsecured Creditors to the Motion Pursuant to 11 U.S.C. § 363 and 503 (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and Key Employee Retention Plan and (II) Granting Related Relief* [Docket Nos. 293 and 302] (the “Committee Objection”) to which the Debtors filed a reply [Docket No. 344].

6. At the commencement of the KEIP Hearing, counsel for the Debtors announced to the Court that:

[W]e have, over the course of the last 24 hours and into this hearing, worked constructively with the Committee to reach a deal. We have papered the deal. Our client has signed off, I believe, and I’ll ask Creditors’ Committee counsel to also confirm at the end that not only do they agree with the deal that I read into the record, but also that their Committee has approved that deal.

Hearing Transcript pp. 219-20, lns. 23-25, 1-4. Debtors’ counsel then proceeded to meticulously read into the record the parties’ agreement to modify certain provisions of the KEIP (the “KEIP Agreement”). See Hearing Transcript pp. 220-23. A copy of the April 29, 2019 Hearing Transcript is attached to this Statement in Opposition as **Exhibit A** (the “Hearing Transcript”).² One of the key negotiated provisions of the KEIP Agreement was that “[t]he net operating cash flow metric would switch to an EBITDA metric based on the Debtors’ 2019 business plan, provided that \$35 million of EBITDA would be the threshold metric, and that metric would be adjusted based on the

² The KEIP Hearing portion of the Hearing Transcript is contained within pages 219-237 of the Hearing Transcript.

timing of the exit...and all EBITDA targets are net of all amounts payable under the KEIP plan.”
Hearing Transcript p. 220, lns. 11-19.

7. Debtors’ counsel thereafter asked counsel to the Official Committee to confirm that the terms of the KEIP Agreement as read into the record had been agreed to by the Official Committee, and counsel to the Official Committee confirmed the Official Committee’s approval of the agreement. Hearing Transcript p. 224, lns. 1-4. Contrary to the Debtors’ recent assertions, the KEIP Agreement was not subject to, or conditioned on, further discussion, negotiation or approval of definitive documentation. Indeed, after reading the entire KEIP Agreement into the record, Debtors’ counsel stated, “So, Your Honor, that’s the record. That’s the deal.” Hearing Transcript p. 223, ln. 13.

8. To address the U.S. Trustee’s objection to the KEIP, the Debtors then proceeded to make an evidentiary record, including the proffered testimony of the Debtors’ CRO, to support the Debtors’ request that the Court approve the KEIP as modified by the KEIP Agreement. Hearing Transcript pp. 224-27. Counsel for the U.S. Trustee cross-examined the Debtors’ CRO, and the Court heard argument from the U.S. Trustee and counsel for the Debtors. Hearing Transcript pp. 227-36. After taking a brief recess, the Court issued and orally approved the KEIP as modified by the KEIP Agreement and requested that the Debtors’ counsel prepare and circulate a form of order. Hearing Transcript p. 237, lns. 1-5.

9. The Debtors never circulated a proposed form of order to reflect the Court’s oral ruling at the KEIP Hearing. In fact, soon after the KEIP Hearing, the Debtors apparently decided that the “deal” that they read into the record was not acceptable and attempted to renegotiate the express terms of the KEIP Agreement. For example, the Debtors informed the Official Committee’s advisors that they could not abide by their agreement that EBITDA targets would be

net of amounts payable under the KEIP, which was a key component of the KEIP Agreement. Subsequently, the Debtors also requested modifications to the calculation of EBITDA inconsistent with the EBITDA calculation in the Debtors' 2019 Business Plan and, ultimately, asked the Official Committee to agree to shift the methodology for calculating bonuses back to a net operating cash flow metric.

10. The Official Committee has been willing to discuss potential modifications to the KEIP Agreement and did, in fact, engage in good faith negotiations with the Debtors on these issues. Ultimately, the parties were unable to reach a compromise to modify the terms of the KEIP Agreement.

11. On May 15, 2019, the Debtors unilaterally set another hearing on the KEIP portion of their Employee Incentive Motion by filing their *Amended Notice of Hearing on Motion of the Debtors Pursuant to 11 U.S.C. § 363 and 503 (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and Key Employee Retention Plan and (II) Granting Related Relief* [Docket No. 459] (the "Amended Notice"). In the Amended Notice, the Debtors stated that "[a]t the hearing on April 29, 2019, the parties announced on the record that they reached a settlement with respect to the KEIP, **subject to approval of final documentation by the parties.**" Amended Notice ¶ 9 (emphasis added). The Amended Notice further stated that "the Debtors and the Committee have engaged in further discussion with respect to such documentation and consistent with the statement made on the record at the April 29, 2019 hearing. To date, the parties have been unable to reach agreement on such documentation regarding a modified KEIP." Amended Notice ¶ 10.

STATEMENT IN OPPOSITION

12. The Court has already conducted a complete evidentiary hearing on the KEIP portion of the Debtors' Employee Incentive Motion and orally approved the KEIP as modified by the KEIP Agreement. The Debtors simply have no basis to ask this Court to rehear this matter.³

13. The KEIP Agreement is enforceable as a matter of law under Texas Rule of Civil Procedure 11 ("Texas Rule 11"), which applies to contested matters and adversary proceedings pending in Texas bankruptcy courts. *See Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir. 1995) (noting that when "extensive federal legislation exists but fails to address the specific issue to be decided" and where "a strong federal interest is not present, the *Erie* doctrine dictates the application of state law" and concluding that Texas Rule 11 applies to a settlement announced before a bankruptcy court sitting in Texas where "the alleged agreement was negotiated and to be performed in Texas."); *In re McCarble*, No. 14-33210, 2016 Bankr. LEXIS 2822, at *6 (Bankr. S.D. Tex. Aug. 4, 2016) ("[Texas] Rule 11 applies to a settlement announced before a bankruptcy court."); *Janzen v. Classy Chassis, Inc., (In re Classy Chassis, Inc.)*, Adv. No. 01-5102, 2003 Bankr. LEXIS 1974, at *3 (Bankr. W.D. Tex. Sept. 4, 2003) ("Settlements made in a bankruptcy case are governed by state law, not federal law."); *In re Mortg. Analysis Portfolio Strategies*, 221 B.R. 386 (Bankr. W.D. Tex. 1998) (applying Texas Rule 11 to a settlement agreement entered into in connection with a contested matter).

14. Texas Rule 11 provides that:

Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or ***unless it be made in open court and entered of record.***

³ Because the Court has already ruled on the Employee Incentive Motion, if the Debtors disagree with the result, a more appropriate approach would likely be to file a motion to reconsider.

Texas Rule of Civil Procedure 11 (emphasis added). Here, as detailed above, the KEIP Agreement was negotiated, agreed to, and then recited in its entirety “in open court and entered into the record” by Debtors’ counsel and confirmed by counsel for the Official Committee. All material terms of the KEIP Agreement were read into the record, and the KEIP Agreement was not (contrary to the Debtors’ statements in the Amended Notice) “subject to approval of final documentation by the parties”. Amended Notice ¶ 9. The KEIP Agreement, as approved by this Court on April 29, 2019, is plainly enforceable against the Debtors.⁴

15. This behavior is precisely the kind that Texas Rule 11 is designed to prevent. One of the overriding purposes of Texas Rule 11 is to “avoid any dispute over the terms of an ‘oral settlement agreement.’” *In re Mortg. Analysis Portfolio Strategies*, 221 B.R. at 10 (finding that an oral settlement agreement that was read into the record at a deposition and then later filed with the court complied with Texas Rule 11 because “[t]his procedure clearly avoids any dispute over the terms of an ‘oral settlement agreement’ which the Texas Supreme Court in *Padilla* found was the purpose of the Rule. And here, there is no dispute as to what was said or agreed upon. How can there be? It was recorded when made and then filed of record.”). When a court determines that a settlement agreement has been entered into in compliance with Texas Rule 11, the agreement may be “summarily enforced.” *White Farm Equipment Co. v. Kupcho*, 792 F.2d 526, 530 (5th Cir.

⁴ Even if the KEIP Agreement were subject to further documentation, that would not change the nature of the agreement or its enforceability against the Debtors. See e.g. *White Farm Equip. Co. v. Kupcho*, 792 F.2d 526 (5th Cir. 1986) (finding that where all of the material terms of a settlement agreement had been agreed to and read into the record by the parties and where the court had ordered the parties to “draft documents reflecting their agreement”, that the refusal by one of the parties to sign the documents ultimately prepared did not render the initial agreement unenforceable); *Gen. Metal Fabricating Corp. v. Stergiou*, 438 S.W.3d 737 (Tex. App. 2014) (holding that a settlement agreement read into the record that contemplated entry into a number of formal agreements to implement the settlement, including “a promissory note, deed of trust, security agreement, and any necessary financing statements” was a binding settlement agreement and not conditioned on final entry or agreement upon formal documentation); *Herring v. Heron Lakes Estates Owners Ass’n*, No. 14-09-00772-CV, 2011 Tex. App. LEXIS 5 (Tex. App. Jan. 4, 2011) (“Parties may enter into a binding settlement agreement even if the parties contemplate that a more formal document memorializing the agreement will be executed at a later date.”)

1986) (“Federal Courts have held under a great variety of circumstances that a settlement agreement once entered into cannot be repudiated by either party and will be summarily enforced.”) (quoting *Cia Anon Venezolana de Navegacion v. Harris*, 374 F.2d 33, 35 (5th Cir. 1967)).

16. In *In re Omni Video*, the Fifth Circuit emphasized that enforcing settlement agreements that comply with Texas Rule 11 supports the Fifth Circuit’s “policy that valid settlement agreements should be enforced” and emphasized that “[l]itigants may not disavow compacts thus made and approved, for avoiding the bargain would undermine its contractual validity, increase litigation, and impair efficient judicial administration.” 60 F.3d at 233 (quoting *White Farm Equipment Co.*, 792 F.2d at 528). In *White Farm Equipment Co.*, the Fifth Circuit further explained that:

While suits are filed and defended so that they may be decided in accordance with law, compromise of purely private litigation is universally encouraged. When the trial date has arrived, the parties are assured of their day in court. They may then, faced with an imminent decision by a judge or jury, compose their differences. But, having decided to compromise and having obtained court approval, they may not back and fill.

792 F.2d at 530.

17. The facts here perfectly illustrate how the failure to enforce an agreement that complies with Texas Rule 11 increases litigation and impairs efficient judicial administration. For whatever reason, the Debtors have decided that they do not like the “deal” that was announced on the record and now want to disavow the KEIP Agreement. Allowing the Debtors to re-trade the KEIP Agreement would not only be contrary to controlling Fifth Circuit precedent, but it would also reward the kind of improper behavior that Texas Rule 11 was designed to prevent.

**REQUEST FOR ENTRY OF PROPOSED ORDER
CONSISTENT WITH THE COURT'S PRIOR RULING**

18. Attached hereto as Exhibit B is a proposed *Order (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and (II) Granting Related Relief* (the "Proposed Order"), which memorializes and incorporates the Court's ruling approving the KEIP as modified by the KEIP Agreement. The Official Committee respectfully requests that the Court enter the Proposed Order.

NOTICE

19. Notice of this Statement in Opposition shall be provided to all parties on the Debtors' Limited Service List. The Official Committee respectfully submits that such notice is sufficient under the circumstances and that no further notice is required.

WHEREFORE, for the reasons set forth herein, the Official Committee respectfully requests (i) entry of the Revised Proposed Order and (ii) such other relief as is just and proper.

Dated: May 28, 2019

Respectfully Submitted,

By: /s/ Ian T. Peck

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 28, 2019, true and correct copies of the foregoing were served (i) via e-mail (where available) or via United States first class mail, postage prepaid on the parties on the attached Service List; and (ii) via e-mail on the parties who receive electronic notice in this case pursuant to the Court's ECF filing system.

/s/ Ian T. Peck

Ian T. Peck

PHI, Inc., et al.
Core/2002 Service List
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PHI, Inc., et al.
Core/2002 Service List
Case No. 19-30923-S/G

DESCRIPTION	NAME	NOTICE NAME	ADDRESS 1	ADDRESS 2	CITY	STATE	ZIP	COUNTRY	PHONE	FAX	EMAIL
Counsel to Texas Department of Insurance, Division of Workers' Compensation	Texas Attorney General's Office	Attn: Todd B. Headen, Assistant Attorney General	Bankruptcy & Collections Division	P. O. Box 12548-MC 008	Austin	TX	78711-2548		512-463-2173	512-936-1409	Todd.Headen@oag.texas.gov
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Exhibit “A”

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-30923-hdh-11**
)
PHI, INC., et al.,) Dallas, Texas
) April 29, 2019
Debtors.) 9:00 a.m.
)
) MOTIONS
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARLIN DEWAYNE HALE,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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25 Proceedings recorded by digital sound recording;
transcript produced by transcription service.

1 DALLAS, TEXAS - APRIL 29, 2019 - 9:00 A.M.

2 THE COURT: I'll take appearances in the courtroom in
3 PHI, Inc.

4 MR. CALIFANO: Good morning, Your Honor. Tom
5 Califano with DLA Piper on behalf of the Debtors. With me at
6 counsel table are my partners Dan Simon and Michael Hynes.

7 THE COURT: Welcome.

8 MR. DUNNE: Good morning, Your Honor. Dennis Dunne
9 from Milbank, LLP, proposed counsel for the Official Committee
10 of Unsecured Creditors. I am joined in the courtroom by my
11 partners Andrew Leblanc and Alan Stone. Thank you.

12 THE COURT: Welcome to our Court.

13 MR. STONE: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. PECK: Good morning, Your Honor. Ian Peck with
16 Haynes and Boone, proposed co-counsel to the Committee. I
17 think Mr. Staab is going to join me a little later.

18 THE COURT: Welcome.

19 MR. CLEMENT: Good morning, Your Honor. Zack Clement
20 and Kevin McCullough on behalf of Thirty Two, LLC, secured
21 creditor.

22 THE COURT: Welcome to you.

23 MR. LEVICK: Good morning, Your Honor. Larry Levick
24 on behalf of putative class action plaintiff Christina Wray.

25 THE COURT: Welcome.

1 MR. STRUBECK: Good morning, Your Honor. Louis
2 Strubeck of Norton Rose Fulbright. I'm here with Greg Wilkes,
3 and we represent Wilmington Trust Company, Indenture Trustee
4 for the senior notes, the \$500 million senior notes. I
5 believe that Mr. Somerstein is on the phone as well, so he'll
6 make an announcement in just a second. Thank you.

7 THE COURT: Okay. We'll take appearances by
8 CourtCall in a minute.

9 MS. CHIARELLO: Good morning, Your Honor. Annmarie
10 Chiarello of Winstead, P.C. here on behalf of Wells Fargo
11 Equipment Financing.

12 THE COURT: Welcome to you.

13 MR. MOORE: Good morning, Your Honor. Will Moore
14 from Katten Muchin Rosenman representing Banc of America
15 Leasing & Capital.

16 THE COURT: Welcome.

17 MR. BROOKNER: Good morning, Your Honor. Jason
18 Brookner; Gray, Reed & McGraw; for the Equity Committee, along
19 with David Golubchik, who's over here, from Levene, Neale,
20 Bender, Yoo & Brill in California.

21 THE COURT: Welcome to our court, sir.

22 MR. GOLUBCHIK: Good morning, Your Honor. I didn't
23 know if I needed to show up. I mean, over here.

24 THE COURT: Glad to have you.

25 MR. GOLUBCHIK: Thank you.

1 THE COURT: Showing up is always a good idea.

2 MS. KIPPES: So here I am. Good morning, Your Honor.
3 Meredyth Kippes on behalf of the United States Trustee.

4 THE COURT: Good morning to you. I'll take
5 appearances by CourtCall.

6 MR. DAVIS: Good morning, Your Honor. Matthew Davis
7 on behalf of Airbus Helicopters.

8 THE COURT: Welcome.

9 MS. GREWAL: Good morning, Your Honor. Angela Grewal
10 on behalf of Regions Equipment Finance Corporation.

11 THE COURT: Welcome to you.

12 MR. LIM: Good morning, Your Honor. Lloyd Lim on
13 behalf of Fifth Third Equipment Finance.

14 THE COURT: Good morning. Anyone else wish to make
15 an appearance by CourtCall?

16 For your benefit, we have several representatives of the
17 press listening in.

18 MR. CALIFANO: Well, I'll try and behave myself,
19 then, Judge.

20 Your Honor, a few things to just inform the Court about,
21 and then I think I have some, hopefully, good news. And then
22 we can talk about the suggested way of going forward.

23 Your Honor, as you may be aware, on Thursday the Equity
24 Committee was formed. Okay. Also on Thursday, the Debtors'
25 management did a presentation of the business plan to the

1 Committee members. On Friday, we had a call with the Equity
2 Committee lawyers. And rather than -- you know, I had
3 originally said we were going to bring a motion to disband the
4 Equity Committee. On second thought, we thought we'd talk to
5 them, see if we could talk -- find a limited scope and
6 duration, and maybe a motion may not be necessary. So we're
7 trying to see if we can work that out. So we had a call with
8 their lawyers on Friday.

9 Also on Friday, the Debtors filed the valuation by
10 Houlihan, which is a supplement to the disclosure statement,
11 and the liquidation analysis.

12 On Sunday, Houlihan did a presentation of their valuation
13 to the actual members of the Equity Committee.

14 And then, Your Honor, since that time, the company was
15 able to have Houlihan agree to voluntarily reduce their fees
16 by providing a 30 percent discount for any financing
17 transaction fees. That happened late in the day yesterday.
18 We didn't get a chance to let everyone know. It's -- but,
19 basically, the secured financing portion goes from a two
20 percent fee to a 1.4 percent fee. The unsecured portion,
21 three percent to 2.1 percent. And for any equity raise, six
22 percent to 4.2 percent. And that impacts the Houlihan fee.

23 Another thing that impacts the Houlihan fee, Your Honor --
24 and listen, there's a lot of he said/she said going on here,
25 but we try to engage. We've tried to engage with the

1 Committee to see what their major issues were, and we were
2 unable to do so. Whether it's our fault or their fault
3 doesn't matter.

4 But in reading their pleadings, it seemed like the two
5 issues that they have with our plan are the rights offering
6 provision and the discounted buyout. And it seems like they
7 were interpreting that as some way for the existing equity to
8 come back and get a bigger slice of the pie. And as I
9 informed Mr. Dunne shortly before the hearing, the Debtors
10 have agreed to remove both the rights offering and the
11 discounted buyout provision from the plan.

12 So it simplifies the plan. You know, we didn't think it
13 was problematic. We thought it was an investment opportunity
14 offered to the unsecureds. But instead it's coming out, Your
15 Honor, completely. And it's going to be a simple equitization
16 under the plan.

17 Now, to get the hopefully good news. There was a
18 conversation between the financial advisors for the Committee,
19 one of the committee members, Mr. Del Genio, Alan Brass, who
20 is an independent director, chair of the restructuring
21 committee and also on the comp committee, and Mr. Lance
22 Bospflug. And I believe that a deal on the KEIP, a deal in
23 principle, was worked out on the KEIP. And right now, Mr. Del
24 Genio and Mr. Zellin are trying to write it up so that we have
25 something we can announce.

1 So that, that is a positive development. And maybe they
2 were able to make a deal because the lawyers weren't on the
3 phone. I don't know.

4 But, so we have a number of matters on today, Your Honor.
5 The Debtor has on the ordinary course professionals motion.
6 We've received no objection to that. We also have the
7 continued hearing on the utilities motion. We've received no
8 objection to that. We also have the key employee incentive
9 program motion, which I just mentioned, and hopefully that is
10 resolved. We have the Houlihan retention application, which
11 has been adjourned from April 15th by agreement of the
12 parties. And then, finally, Your Honor, we have a mediation
13 motion. Okay?

14 And then the UCC has filed a motion in limine, and what
15 they call an 1103 motion to put things off. So my
16 recommendation, and this is what I ran by Mr. Dunne -- and if
17 I've gotten any of it wrong, Dennis, just please let me know
18 -- that, because of the time constraints we have today, I
19 would recommend we put -- with Your Honor's approval, we put
20 on the ordinary course and utilities motions. There's no
21 objection. They should go smoothly. Then we move right into
22 the Houlihan retention so we can get that done.

23 Hopefully during that time, Mr. Del Genio will run into
24 court with a piece of paper saying we have a deal and that we
25 will not need to go into the KEIP. If we do need to go into

1 the KEIP, we're prepared to go forward on that.

2 And then with respect to the mediation motion, Mr. Dunne
3 and I agreed to just take a break between the hearings, and it
4 might be coincidentally at lunchtime, and we've been talking
5 about a mediation process. I need to confer with my side, he
6 needs to confer with his side, but we would just ask -- and
7 then after that we, you know, we can have the -- if we need to
8 address, we can address the Committee's 1103 motion.

9 But that would be my recommendation, Your Honor, for how
10 we would proceed today.

11 THE COURT: All right. Mr. Dunne?

12 MR. DUNNE: Good morning, Your Honor. For the
13 record, Dennis Dunne from Milbank on behalf of the Official
14 Creditors' Committee.

15 And Mr. Califano is correct. We had a sidebar before the
16 hearing commenced and he informed me of some of the -- of the
17 scheduling issues here. And I'm generally okay with what Mr.
18 Califano proposed, and he's right that either we're on the
19 cusp of getting to a deal on the KEIP and the KERF, so
20 hopefully with a, you know, a few extra minutes, we can kind
21 of wrap that up and save everybody some time on that.

22 And then we're happy to talk about mediation. You know,
23 we support mediation as well, and were going to suggest it to
24 Your Honor if the Debtors had not. So I think having a
25 further discussion about what that -- what the terms and scope

1 of mediation and the duration of mediation looks like would be
2 helpful.

3 That being said, I would like an opportunity at some point
4 today to advise the Court of what we've been doing as the
5 Official Committee as my first appearance in the courtroom
6 before Your Honor, as well as some of the context for what's
7 going on, recognizing -- and I agree with what Mr. Califano
8 said at the outset -- without, hopefully, inciting any kind of
9 incendiary language, you know, going back and forth. But I
10 would like to do that just kind of matter-of-factly and give
11 some context. I can do that at any point in the day. You
12 know, we could do it -- I could do it now in connection with
13 the KEIP, in connection with the 1103 motion or mediation, but
14 just wanted to make the Court aware of that. That's my only
15 addition.

16 THE COURT: It might make sense to do it before we
17 start the mediation motion.

18 It also seems to me that putting your adjournment motion
19 after you all talk about the mediation, because I think those
20 kind of dovetail with each other, so --

21 MR. DUNNE: I agree. Thank you.

22 THE COURT: Thank you. Okay.

23 MR. CALIFANO: Your Honor, with that, Mr. Simon will
24 address -- oh, I'm sorry.

25 THE COURT: Don't cut off the U.S. Trustee, Mr.

1 Califano.

2 MR. CALIFANO: I'm sorry, Your Honor.

3 MS. KIPPES: That's okay. Your Honor, just one note
4 with regard to the KEIP. I have been -- the proposed
5 resolution has been described to me generally, but I haven't
6 seen it. I'd like to see it, since we've objected, too. So
7 these guys may have a deal. I don't know if we have a deal or
8 not yet.

9 THE COURT: All right.

10 MS. KIPPES: Thanks.

11 THE COURT: Mr. Simon?

12 MR. SIMON: Good morning, Your Honor. Again, Dan
13 Simon, DLA Piper, on behalf of the Debtors. I will be very
14 brief.

15 THE COURT: Okay.

16 MR. SIMON: Obviously, we have much to get through.

17 THE COURT: All right.

18 MR. SIMON: The first matter on the agenda is the
19 final utilities matter. Your Honor heard this shortly after
20 the first-day hearing. We did not receive any formal or
21 informal objections. We have received a handful of additional
22 adequate assurance letters from utilities. We continue to
23 process them per the procedures laid out in the motion. We
24 have not received any comments to the order. We have uploaded
25 a form of order, the only changes of which are simply to

1 update the contact list and the notice parties since we filed
2 it on the first day.

3 THE COURT: All right. Just let me ask for the
4 record: Does anyone wish to be heard on the entry of a final
5 order on utilities?

6 If you would upload that order, I'll sign it upon -- well,
7 I guess we already have it now, so I could -- I may even be
8 able to sign it today.

9 MR. SIMON: Thank you, Your Honor.

10 The next item on the agenda is the motion to employ and
11 retain professionals in the ordinary course. We filed this
12 motion, and the procedures split the -- split the
13 professionals into two tiers, Tier 1 and Tier 2, depending on
14 how much we expected them to bill during the case.

15 We have had -- I've had a number of discussions with Ms.
16 Kippes from the U.S. Trustee's Office on this motion. We've
17 made some changes. We have reduced the Tier 2 amount from
18 \$75,000 per month to \$60,000 per month. We've also provided
19 an aggregate cap of \$250,000. If a professional exceeds that
20 cap, they simply need to file a notice of excess fees.

21 And lastly, what we've done is we've gone through -- we
22 tried to be overinclusive in our exhibit, listing out the
23 professionals, recognizing that, at least in this district,
24 there's not perfectly clear guidelines on who falls under the
25 professionals and who doesn't. So we have worked with the

1 U.S. Trustee and actually removed some of the professionals as
2 they were probably borderline in the first place, and she
3 wanted some clarification that they didn't fall within the
4 ambit of the professionals.

5 And so we have uploaded that order, and I'll ask Ms.
6 Kippes to confirm that agreement, that it resolves her
7 objection.

8 MS. KIPPES: Confirmed, Your Honor.

9 THE COURT: Thank you.

10 For the record, does anyone else wish to be heard on the
11 ordinary course professionals motion?

12 I'll also sign that.

13 MR. SIMON: Thank you, Your Honor. Now we can get
14 back to bigger and better things. Thank you.

15 THE COURT: All right. Let me ask, there is a motion
16 in limine that may affect the Houlihan hearing. Do we need to
17 address that first?

18 MR. CALIFANO: Well, it's not our motion, so --

19 THE COURT: I understand, but --

20 MR. LEBLANC: Your Honor, Andrew Leblanc with
21 Milbank.

22 It is our motion. I don't know, frankly -- the witnesses
23 that it was directed at, I don't know if they're intended to
24 be witnesses for the Houlihan motion or not.

25 THE COURT: And that's why I asking Mr. Califano.

1 MR. LEBLANC: I thought that made sense.

2 THE COURT: Yeah.

3 MR. CALIFANO: Your Honor, Mr. Bospflug will testify
4 in support of the Houlihan retention.

5 THE COURT: All right. Let's hear the motion in
6 limine first, then, and I'll give you a ruling on that, and
7 then we'll move into Houlihan.

8 And I've had a chance to read it, but I will say that I
9 didn't read it at 3:55 when I think it was filed this morning.

10 MR. STONE: Yes.

11 THE COURT: Or at least when it was emailed over
12 here.

13 MR. STONE: Yes. Your Honor, it's pretty
14 straightforward. We asked last week on Thursday the Debtors
15 to tell us if they were going to call any witnesses other than
16 those who had been identified at the hearing today on any
17 topic. They refused to tell us that. They said they would
18 answer us in due course.

19 Among other things, they cited a stipulation that we had
20 signed which said that, absent changes in the factual record,
21 we agreed we wouldn't take any more depositions on the
22 Houlihan and KEIP motions. In fact, after we signed that
23 stipulation, the factual record changed significantly.

24 First of all, when we signed that stipulation, they had
25 produced zero documents to us. We still only have about 400

1 documents, but, nonetheless, we didn't have any documents at
2 the time we filed the stipulation.

3 In addition, the mere act of putting on additional
4 witnesses changes the factual record, in our view. And as a
5 result, we don't think that that stipulation that we signed in
6 any way waives our ability to take the depositions of any
7 other witnesses that they would put on in connection with the
8 Houlihan Lokey application or the KEIP.

9 In addition, with respect to the 1103 motion, there was no
10 such prohibition.

11 So, these two new witnesses that they put on, Mr. Bospflug
12 and Mr. Brass, were not identified until Friday. We promptly
13 asked for their depositions. That request was turned down.
14 We then issued notices of deposition, which, as Your Honor is
15 aware, when they are directed to a party, they're the same as
16 a subpoena. So we conducted the depositions yesterday. We've
17 attached the transcripts of those depositions to the motion.
18 The witnesses did not show up, so there's a certification of
19 nonappearance from the court reporter for each of those
20 depositions. And as a result, we believe that the witnesses
21 should be precluded from testifying today on any topic.

22 THE COURT: Thank you, Mr. Stone. It's nice to have
23 you back in our Court.

24 MR. STONE: Thank you, Your Honor. Nice to see you
25 again.

1 MR. CALIFANO: Your Honor, I think I need to go a
2 little bit into the background of the stipulation. And you
3 know, frankly, I'm a little embarrassed here, because we
4 entered into this stipulation in good faith because Mr.
5 Genereux, who you may recall who testified at the first-day
6 hearing, was no longer at PJT. And we were told we need to
7 get a new expert. So we said, okay, we'll move it -- we'll
8 move it from 4/15 to 4/29, which is when we had time in front
9 of Your Honor.

10 We said, let's see your objection, but you can amend it
11 after you designate your witness. And they did. And they did
12 as we agreed. There's a bunch of other things in here that's
13 unusual. One thing is they were so afraid of what we might
14 say on April 15th, at the April 15th hearing, that we agreed
15 to limit what we would say and not say anything negative about
16 the Indenture Trustee or about the Committee. And we didn't.
17 But it was important to us, Your Honor, that we not get hit
18 with depositions, okay? What I should have anticipated was
19 they were going to use that two weeks to file this so-called
20 1103 motion and then a motion for standing. And I guess they
21 thought there was some litigation tactic to have those on
22 before we got here today.

23 So that's what I'm embarrassed about. I should have
24 anticipated that and I should have anticipated that the real
25 reason behind the adjournment was so that they could throw

1 some more paper at us.

2 The factual record has not changed, okay? And the factual
3 -- they say that the discovery was -- the document discovery
4 had not been produced. Well, it wasn't due then. We
5 complied. They served us with discovery requiring an
6 expedited two-week return. So we started production, okay?
7 We didn't come back here and say, well, the Local Rules -- the
8 Federal Rules give us 30 days, you've got to get a motion on
9 to shorten time. We didn't do that. We voluntarily complied.
10 And we're continuing to comply. But if they didn't have the
11 discovery, that's their fault, because they set the time frame
12 on it, okay?

13 Additional witnesses: We didn't -- we didn't designate
14 additional witnesses. We complied with the Local Rule. And
15 they probably should have looked at the Local Rule. The Local
16 Rule requires that you file your witness list three days
17 before the hearing. We did that, Your Honor. It also says --
18 9014(1)(c)(2) says it assumes that the Debtors will testify at
19 the hearing.

20 The two witnesses we have are witnesses of the Debtor.
21 One is a, as I said, the head of the special restructuring
22 committee and compensation Committee. One is Mr. Bospflug.
23 Okay? Just because we designated witnesses within the Rule
24 doesn't mean that's an additional witness.

25 They didn't serve a 30(b)(6) at any time. They never

1 said, and it doesn't say in the stipulation, that they'll get
2 depositions.

3 The reason why we entered into the stipulation, part of
4 the underlying consideration was that the discovery would
5 stop. We expressly said, we don't want depositions during
6 this two-week period. But unfortunately, it is.

7 Now, the Local Rule doesn't say that once you file your
8 witness list you have to make the witnesses available for
9 deposition, because then every time we have a Monday hearing
10 I'd have to have all my witnesses here on Saturday or Sunday,
11 ready to be deposed. That's not what the Local Rules hold.

12 So then what happens, where do you go next? To the
13 Federal Rules? The Federal Rules don't require that any
14 witness on a motion be available for a deposition, nor does it
15 permit someone to send a notice on a Friday afternoon
16 demanding a deposition on a Sunday.

17 So we didn't comply, Your Honor. And we told them we
18 weren't going to comply, okay? It -- we weren't going to
19 change people's travel schedule when they were doing something
20 which was directly contrary to what we had thought about in
21 the stipulation.

22 So they hire -- what did they do? They bring a court
23 reporter in -- obviously, they don't care about the costs of
24 this case, they don't care about the court reporter's Sunday
25 -- when they knew there wasn't going to be a witness.

1 The two witnesses, they know who they are, Your Honor.
2 They could have had -- they could have served notices at any
3 time.

4 And the other thing about the factual record that's
5 disingenuous, we have witnesses who are going to testify to
6 the facts that are in our motions, okay? So if the KEIP is
7 not settled, then Mr. Brass will come up and testify to the
8 assertions that are made in our motion about how the comp
9 committee operated and approved these bonuses, okay?

10 Mr. Bospflug, in the Houlihan retention, is going to
11 testify to those facts related to the Houlihan retention in
12 our motion, Your Honor. Because, you know, we like to have a
13 witness when we try and -- when we put facts forward in a
14 motion.

15 This is a bad faith motion. This is a motion, another
16 attempt to try and derail this case. And for them to come in
17 here not having done what they should have done, okay -- I
18 mean, if they were really acting in good faith, this
19 stipulation would have provided for depositions, okay? It
20 doesn't. It expressly deals with it.

21 Now, additional facts in the record would be if we filed a
22 supplemental motion, Your Honor, or if we put in a new
23 declaration. These aren't new facts. We're not coming in
24 with new facts. And the fact that a witness is designated for
25 facts we allege, that's just what you're supposed to do. When

1 you come in here and make statements of fact, you should have
2 a witness.

3 This shouldn't be delayed again, Your Honor. It was
4 delayed at their request, and it should not be delayed any
5 further.

6 But if Your Honor is willing to entertain this motion at
7 all and if Your Honor disagrees with me that this is just a
8 bad faith attempt to derail us one more time, I would ask Your
9 Honor to allow the witnesses to testify. And then if there is
10 an additional -- an additional fact, or if any of these
11 witnesses come in with a fact that's not in our motion, then
12 we can deal with it, Your Honor. But this -- there's no --
13 there is no basis. First of all, they agreed not to do it.
14 This nonsense about additional facts in the record is just
15 that. And they had the opportunity if they were sincere.
16 They're not, so they waited until Friday, asked me for a
17 deposition notice. We complied with the Local Rules, Your
18 Honor. There's nothing in the Local Rules that allow them to
19 do that. There's nothing in the Local Rule that says we can't
20 introduce a witness who we haven't made available for
21 deposition.

22 We complied with the Rules. We complied with our
23 stipulation, Your Honor. I don't know what the stipulation
24 means if they can just say, well, you put out a witness list.
25 We didn't anti... they had -- these aren't additional

1 witnesses, by the way. They -- we had never told them who our
2 witnesses were prior, okay?

3 They wanted to depose Mr. Del Genio. We made him
4 available. They wanted to depose Mr. Niemann. We made him
5 available. So this motion, Your Honor, smacks of bad faith
6 and is just another attempt to get in the way of a debtor who
7 is trying to do what is completely appropriate under the
8 circumstances. Thank you, Your Honor.

9 THE COURT: Thank you. Mr. Stone, you get to go
10 last.

11 MR. STONE: Your Honor, my first hearing on this
12 case, and I already get accused of bad faith. It's pretty
13 amazing.

14 THE COURT: I just -- well, let me just say I have a
15 high degree of respect for you, Mr. Stone. So, --

16 MR. STONE: I appreciate that, Your Honor.

17 Your Honor, exactly the problem. They never told us. We
18 asked them who their witnesses would be and they didn't tell
19 us.

20 It really -- you know, I haven't practiced before Your
21 Honor in a while, but my recollection is that Your Honor is
22 not in favor of trial by ambush. And perfectly reasonable if
23 they want to wait until the deadline for disclosing their
24 witnesses to us, but then it's perfectly reasonable for us to
25 get a deposition over the weekend as well before the hearing,

1 so we know what those witnesses are going to say.

2 That's exactly the problem. They never told us who their
3 witnesses were going to be or what topics they were going to
4 testify. And we did ask.

5 And I'm not going to get into the back-and-forth on the
6 stipulation. Suffice it to say that we think that the texture
7 of this case and the factual record changed tremendously
8 because we didn't have document one when we signed that
9 stipulation. And in terms of what we knew -- what they knew
10 at that time, I'm not going to get into the back-and-forth,
11 but they were certainly aware that we were going to file an
12 1103 motion and that we were contemplating a standing motion
13 as well.

14 So, Your Honor, for all the reasons that we state in our
15 papers, we think this is sort of trial by ambush, and Your
16 Honor shouldn't tolerate it, and these witnesses should be
17 precluded from testifying.

18 THE COURT: Thank you.

19 MR. STONE: Thank you, Your Honor.

20 THE COURT: I'll take a short recess for me to visit
21 with my law clerks and I'll give you a ruling on this.

22 I guess let me say this before we start. Mr. Dunne sort
23 of touched on it. We probably need to just stick with the
24 matters that are at hand and avoid the back-and-forth between
25 the lawyers. I think -- at least everybody that's been

1 practicing in front of me, even you out-of-towners know that I
2 really do not like that, and the locals certainly know that.
3 So, from this point on, I expect a different tone.

4 We'll be in recess.

5 THE CLERK: All rise.

6 (A recess ensued from 9:29 a.m. to 9:47 a.m.)

7 THE CLERK: All rise.

8 THE COURT: Good morning again. Please be seated.
9 Thank you very much. Please be seated. Thank you.

10 On the motion in limine, I'm going to allow the two
11 witnesses to testify in support of the facts in the two
12 motions. If the testimony deviates from the facts in the two
13 motions, I'll allow the Committee to re-urge its motion in
14 limine at the end.

15 Just a couple thoughts. I don't really consider this an
16 ambush, as I would have anticipated the Debtor would put on
17 Debtor representatives to testify about the KEIP and Houlihan
18 motions.

19 On the other hand, for lawyers of your caliber, if asked
20 prior to formal designation of witnesses per the Local Rules,
21 if you were asked who you intended to call, I would think that
22 you would provide those names prior to filing a witness list.

23 There is an allegation in Footnote 8 of the motion that
24 documents were late in getting over to the Committee. I'll
25 reserve that to the time that they're offered.

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1 You may call your first witness.

2 MR. CALIFANO: Yes, thank you. Your Honor, Mr. Hynes
3 will handled the witness.

4 MR. HYNES: Your Honor, the Debtor calls Matt
5 Niemann.

6 THE COURT: Mr. Niemann. Good morning. Would you
7 raise your right hand?

8 MR. NIEMANN: Good morning, Your Honor.

9 MATTHEW NIEMANN, DEBTORS' WITNESS, SWORN

10 THE COURT: You may be seated.

11 THE WITNESS: Thank you.

12 MR. HYNES: Good morning, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. HYNES:

15 Q Mr. Niemann, do you see that you have some binders there
16 behind you?

17 A Oh, I do, yes.

18 Q Yeah. Can you put them in front of you, and specifically
19 have Exhibits 29 and 30 as we begin?

20 A I'm sorry, did you say look at 29 and 30?

21 Q Yes, sir. In particular, it would probably speed things
22 along --

23 A I'm there.

24 Q -- if you could get to Exhibit 30. And if you look at the
25 top, there's some typewritten language on the top. If you

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1 turn to 28 of 40, behind Exhibit 30, I think you'll see your
2 name there.

3 A I'm sorry, 28?

4 Q Yeah, Page 28 of 30 at the very top.

5 A I am there.

6 Q Okay. Do you see your name there?

7 A Yes, I do.

8 Q Okay. So could you state your name for the record?

9 A Matthew Richard Niemann.

10 Q And can you remind the Court where you're currently
11 employed?

12 A I am a managing director with Houlihan Lokey, Inc. I'm
13 also employed as a board member with William Lyon, Inc., a
14 public company.

15 Q Can you share with the Court a brief description of your
16 education?

17 A Yes. I spent three years at Loyola New Orleans. I'm
18 going back to college days, no further. And then graduated
19 from St. Louis University in St. Louis, my hometown. Went
20 straight to law school, St. Louis University School of Law. I
21 also have some advanced education-type stuff, but those are my
22 two primary. So, I have a BS/BA in finance from St. Louis
23 University and a JD from St. Louis University as well.

24 Q And can you briefly describe your professional experience?

25 A Yes. I started at Bryan Cave as a summer associate,

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1 actually, and then went straight into full-time associate.
2 Was there for seven years, left. Was briefly at KPMG, then
3 Pricewaterhouse, which then became PricewaterhouseCoopers, for
4 a period of just shy of four years. Then I joined Houlihan
5 Lokey 19-plus years ago. I left Houlihan Lokey for three
6 years, give or take, returning September 15, '08. Just
7 happens to be the day Lehman Brothers filed.

8 When I left Houlihan, I went to Service Capital, started
9 their Chicago operations, and then went into GMAC Res Cap for
10 Service Capital while I was there. It was a portfolio company
11 of theirs. And as I said, returned to Houlihan in -- on
12 September 15, 2008, so that's now 11 years ago; is that right?
13 Where are we? '19? Yes.

14 Q So is it fair to say 17 of the last 30 years you've spent
15 with Houlihan?

16 A Yes, sir.

17 Q Okay. Can you go over briefly your titles and
18 responsibilities at Houlihan only?

19 A I'm a managing director. We have a -- you know, we're the
20 older guys, if you will, the elders. There's five of us that
21 are the seniormost MDs in the group, I am one of them, more by
22 age than anything else, in the financial restructuring group.
23 I also co-head what we call our heli, helicopter, investment
24 banking practice. I've had several other titles and
25 responsibilities over the years. I am resident in our

1 headquarters in Los Angeles, and really split my time Los
2 Angeles, New York, and, these days, Texas.

3 Q Can you go over some of your responsibilities that you've
4 had at Houlihan?

5 A Yeah. First and foremost is provision of professional
6 services ensuring, I guess, best practices, for lack of a
7 better description. You know, we're all about reputation and
8 our brand is our reputation. So my job is to make sure we do
9 the best job possible for our clients. My job is also to
10 identify and source, if you will, opportunities. My job is to
11 mentor and shape sort of our future generation of
12 professionals. It's a very mentored-based practice. And my
13 job is to get things done for my clients, and, consequently,
14 for the firm, because we are paid when things get done.

15 Q And you mentioned that you're also currently employed by
16 William Lyon Homes; is that right?

17 A Yes. I think it will be for about another month. I've
18 had a seven-year position there as a board member. I'm the
19 comp committee chair, have been for seven years. And I come
20 off at the annual meeting, which I believe is this coming
21 month, May. And also was co-chair of the IPO committee when
22 we went public six years ago now, and on the audit and
23 governance committees as well.

24 Q Are you a member of any other boards or other
25 organizations of note?

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1 A I enjoyed five years of what I call guest-lecturing or
2 adjunct at Northwestern University with Professor Shine, Jim
3 Shine, a case study that I would do each year. That was also
4 a follow-up of the ABI. It was the MBA competition that we
5 founded. I want to say it was, gosh, it's probably 15 years
6 ago now. We, Houlihan, and I particularly, did the first case
7 study, and then taught that for years at Northwestern's
8 Kellogg School of Management. I also have been on the --
9 what was called disquisition committee. It's actually to
10 review dissertation candidates for Webster University in St.
11 Louis. I've also been on the board of my parish, Our Holy
12 Redeemer Parish, parish counsel, as treasurer, as well as a
13 school board, as treasurer. And the Ronald McDonald Houses.
14 It's technically the St. Louis Oncology Association. It's the
15 Ronald McDonald Houses of Greater St. Louis there. I was also
16 on the executive committee and treasurer.

17 Q And is that an accurate summary of your biography there
18 behind Exhibit 30 at Page 28 of 40?

19 A Yes, it is.

20 Q Okay. Have you -- how many times have you been certified
21 as an expert in restructuring matters?

22 A I mean, it's -- it's in excess of 23, because literally
23 within months of leaving Bryan Cave I was certified by Judge
24 Barta as an expert, under *voir dire*, in fact. Never been *voir*
25 *dire'd* since. And so at least 23 times, and I'd say it's

1 probably more like 50-plus, because at least a couple of times
2 a year.

3 Q And have you ever -- has a court ever refused to certify
4 you as a proffered expert?

5 A Not yet.

6 Q Have you ever testified on behalf of a fee application?

7 A I've testified on behalf of my own fee applications,
8 Houlihan's. I have never testified against any others, other
9 than perhaps to opine or support -- like in this case, PJT,
10 for instance, has represented the Committee, so I'm asked my
11 opinion by the board, and at some point I'll probably be asked
12 my opinion in this court. And so in that respect, but never
13 as an adverse witness, if you will, or a competing expert to
14 challenge another professional's fees. I just never have been
15 asked to do that.

16 Q Can you briefly describe for the Court Houlihan's role
17 with PHI?

18 A It's evolved. It started in -- as M&A advisor with my
19 partner, Rick Lacher, who was co-leading the engagement with
20 me back in -- really kind of started in August; I think our
21 engagement letter is dated September -- to explore M&A
22 alternatives. And then it shifted, as we were approaching
23 maturity, into restructuring, and I started taking more point
24 from Mr. Lacher. Mr. Lacher heads up our public M&A practice.
25 He also co-chairs our fairness committee.

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1 So, more recently, if you will, and this, I would say, is
2 after the first of the year, as we were approaching the March
3 maturities, it shifted into restructuring, of doing what we
4 could to engage with the creditors. And by that, I mean the
5 noteholders as well as lessors. There's 130 or so of lessor
6 obligations out there that need to be dealt with across 15
7 different lessors. That's just the ones that are filed.
8 There's a couple of lessors, HN Zed, which we kept out of
9 chapter. And then, really, to -- how should I say it? And
10 it's part stylistic. I view my job as the chief agent for the
11 transaction, whatever is to happen here. And so it's really
12 to drive a transaction for the benefit of the company and its
13 constituents, and my team is my support for that effort.

14 We've also, as you know, explored and procured financing.
15 We are exploring additional financing to properly capitalize
16 the company on its way out. Within all of that is the due
17 diligence and the rolling up of the sleeves that's necessary,
18 working with Mr. Del Genio and his team at FTI, working with
19 your firm, working with Jones Walker, working with management,
20 and, ideally, working with Milbank, PJT, and the advisors for
21 the noteholders.

22 Q Generally speaking, do you play a role in negotiating
23 engagement letters with Houlihan clients?

24 A Yeah, I probably play a more active role than a lot of my
25 partners. There are several of us that are former lawyers, if

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1 you will, so I directly negotiate and directly document my own
2 engagement letters. It's a very important part of what we do
3 as a firm, and it goes to risk management and making sure that
4 we, you know, get what we negotiated for, no different than I
5 do on behalf of a client.

6 Q And was your role any different in negotiating the
7 engagement letters with PHI?

8 A The only difference was that I don't negotiate a whole
9 bunch of public M&A engagement letters, but I was front on
10 that as well, of course, with Mr. Lacher, my partner. But
11 otherwise, it was pretty much as usual. It might have been a
12 little more heavily-negotiated than some, but, you know, they
13 all get negotiated.

14 Q And who participated in those negotiations?

15 A From Houlihan?

16 Q Yes.

17 A Myself. To a lesser degree, Mr. Lacher.

18 Q What about from PHI?

19 A Primarily, Mr. Bospflug -- you swallow the G, I'm told.
20 The -- and then Mr. Gonsoulin and Ms. McConnaughhay. I'll get
21 to the spelling on that one. It's Trudy McConnaughhay. She
22 is the CFO and treasurer. The bulk of it was Mr. Bospflug and
23 Ms. McConnaughhay.

24 Q And was PHI represented by counsel?

25 A Yes, they were. Jones Walker on the M&A engagement letter

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1 in September, and then Jones Walker and Mr. Califano's firm in
2 January when we amended and restated our engagement letter to
3 address the restructuring mandate.

4 Q In connection with that negotiation of the engagement
5 letters, did you provide any information to the company?

6 A Yes, we did.

7 Q Okay. Would you please look behind Tab 35 of the binder?

8 A Yes, sir.

9 MR. HYNES: Has the Court -- has the Court had the
10 opportunity to get there?

11 THE COURT: I have it.

12 MR. HYNES: Thank you, Your Honor.

13 BY MR. HYNES:

14 Q Mr. Niemann, do you recognize this document?

15 A Yes, I do.

16 Q What is it?

17 A It's a document that I prepared, with the help of my team,
18 but I physically -- it annoys my team sometimes, but I
19 physically get into the Excel and prepare this specifically
20 based on the information. It's a two-page document. Page 3
21 is really comparing the PJT fee as proposed, I believe this
22 was in February, against other debtor advisors to help the
23 board and management understand whether or not PJT's fee is
24 reasonable on an economic basis. Then the second page, which
25 is Page 4 -- I believe this is out of some board deck -- is a

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1 fee study of select debtor engagements, again, to give the
2 board and management perspective on what the market is for
3 similarly-sized and recent vintage. We don't go back nine or
4 ten years on this. This market is always evolving. So we
5 went back through 2015 through 8/18, which is when this, I
6 believe, was posted to the management and the board. We
7 looked at \$300 to \$800 million of prepetition debt. We also
8 included CHC and Waypoint because they're the most recent
9 helicopter deals. They also happened to have either Houlihan
10 and/or PJT involved, so we thought that was just another sort
11 of relevant data point that the board and management would
12 want to know about.

13 Q And what is the importance of this document?

14 A How should I say this? I guess, as a board member, and
15 management, but I would want to make sure, if I'm retaining a
16 professional that's paid on a contingent fee basis, that
17 there's a market for the fees I'm approving. And so the
18 purpose of this document is to provide that.

19 I should point out, in particular, on Page 3 -- in fact, I
20 think exclusively on Page 3 -- Page 3 is a collection of
21 comps, if you will. We actually ran those from \$300 million
22 to \$700 million. Some of these are -- and some history is
23 appropriate. PJT was advising the Ad Hoc Noteholders prior to
24 taking on the representation of the Unsecured Creditors'
25 Committee. So this was when they came to us and said, we'd

1 like \$150,000 a month and a three-and-a-quarter, a \$3.25
2 million transaction fee. We approved it as requested. No
3 changes, no negotiating. Approved the economics. I think Mr.
4 Califano and his team had some tweaking to do on the letter.

5 Some of these comps, not all of them, were provided by
6 PJT. So, and then others were added by my team to just give a
7 broader sample set and to essentially battle-test. And based
8 on this, we decided that PJT's fee, relative to Houlihan's
9 fee, was fair, especially when you look at their fee -- or I'm
10 sorry, others, some of theirs, some of ours, relative to
11 debtor-side advisor fees. That's on Page 3. We deemed it to
12 be appropriate.

13 Q And from where did you get the information used to prepare
14 the survey?

15 A Two sources. The PJT -- there's another document that's
16 not in front of me right now. PJT sent us their comp set. It
17 was a much smaller comp set. I want to say it was seven or
18 eight. So we included those, and then we added to it. So
19 part of the source, if you will, was PJT.

20 I will tell you, I did not have my guys go check their
21 data. We just accepted it as laid. And then we added to it
22 from our own database. We maintain a database on fees:
23 creditor side, Unsecured Creditors' Committees, ad hoc
24 committees, and debtor side. So it's a combination of those
25 two, if you will, sources.

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1 Q And does this chart fairly summarize the contents of more
2 voluminous records?

3 A I can't tell you whether it fairly summarizes the
4 information PJT relied on. We just took it at face value.
5 But it fairly summarizes the information from our database.

6 MR. HYNES: Your Honor, we would move Exhibit 35 into
7 evidence.

8 MR. LEBLANC: No objection, Your Honor.

9 THE COURT: 35 is in.

10 MR. HYNES: Thank you, Your Honor.

11 (Debtors' Exhibit 35 is received into evidence.)

12 BY MR. HYNES:

13 Q Mr. Niemann, can you please go back to Exhibits 29 and 30
14 in the binder?

15 A Yes, sir. 29 and 30?

16 Q Uh-huh. Once you've had an opportunity to look at those
17 documents, can you tell me what they are, if you know?

18 A Yeah. 29 -- yes, I'm sorry, yes, 29 is the application of
19 the Debtors to employ and retain Houlihan Lokey Capital, Inc.
20 as investment banker nunc pro tunc to the petition date of
21 March 14, 2019.

22 I am -- let me just make sure. It also has a proposed
23 order that's been revised, but a proposed order attached to
24 it. That's what 29 is.

25 Oh, I'm sorry, the Niemann declaration. That's what I was

1 looking for. So, my declaration is also part of 29. And then
2 the exhibits to my declaration, which would be our
3 qualifications of our principal professionals, and then there
4 should be a relationship -- hold on just a second, I'm sorry
5 -- interested party list that we received. That's Exhibit 3.
6 And then there's a relationship with interested parties,
7 Exhibit 4. And that is the totality of -- I did. I went into
8 30. I'm sorry. I was -- so that's the totality of the
9 application.

10 Q Yep. Just for the record, though, is it fair to say that
11 your declaration is Exhibit -- Trial Exhibit 33, which also
12 serves as Exhibit B to the motion to approve the Houlihan
13 Lokey engagement letter?

14 A I'm sorry, declaration -- 33 is the declaration of Mr.
15 Lewis, Martin Lewis, in support of the Committee's objection.
16 So that is definitely not mine.

17 Q Exhibit 30.

18 A Oh, 30? I thought you said 33.

19 Q Uh-huh.

20 A Yes. My declaration.

21 Q Okay. On Exhibit 30, can you please turn to Page 10 of 40
22 if you're looking at the top right-hand corner of that page?

23 A I'm there.

24 Q And what is this document?

25 A This is our -- I referenced it earlier -- our amended and

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1 restated engagement letter, it's dated January 6, 2019,
2 between Houlihan Lokey and the company.

3 Q Can you turn to Page 26 of 40, please?

4 A Yes, sir.

5 Q Is that your signature?

6 A It is.

7 Q Okay. And do you recognize the signature below it?

8 A It's Mr. Gonsoulin's. He's the chairman of the board and
9 the chief executive officer of the company.

10 Q All right.

11 MR. HYNES: Your Honor, we would move to have Exhibit
12 30 and Exhibit 29 put into evidence.

13 MR. LEBLANC: No objection.

14 THE COURT: 29 and 30 are admitted.

15 MR. HYNES: Thank you, Your Honor.

16 (Debtor's Exhibits 29 and 30 are received into evidence.)

17 BY MR. HYNES:

18 Q Can you, please, Mr. Niemann, turn back to Page 10 of 40?
19 That's the first page of your engagement letter.

20 A I'm there.

21 Q Okay. Could you please walk the Court through the key
22 provisions of your engagement letter?

23 A Yes. And I'll just keep it high level. First is scope of
24 services. And this was a little different because there was
25 more analytic/advisory/transactional. Typically, we just lump

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1 them all together, you know, ten, fifteen bullets. This one,
2 it was important that we were able to provide some of the
3 analytic and what I would consider somewhat consultative
4 services for the company, so that they didn't have to hire
5 another specialist, that we could do scoop to nuts. So one
6 thing that was different about this, as I think about it, was
7 there was more negotiation around scope. They wanted to make
8 sure we were going to be delivering on what we needed to
9 deliver from an analytic and consultative perspective.

10 The fees are set forth in 3. The monthly retainer of
11 \$200,000 with a credit after I think it's six months. It's
12 the seventh month and thereafter. Then the transaction fees.
13 There's a forbearance transaction fee, a financing transaction
14 fee, a recapitalization transaction fee. That's really a
15 restructuring transaction fee. We call it recapitalization.
16 Or restructuring, sometimes. Sale transaction fees. This was
17 a little more structured since we had the public M&A process
18 underway.

19 The other important aspects of this, certainly from
20 Houlihan's perspective, is the definition of transactions.
21 That's Paragraph 5. The characterization of multiple and/or
22 complex transactions, Paragraph 6.

23 There are some provisions here that require that we get
24 retained under 328 of the Bankruptcy Code. That's important
25 to us and I think any other sophisticated investment banker.

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1 We've got some other provisions around financing
2 transactions, and then near and dear to our general counsel's
3 heart is indemnification and whatnot, which is back in
4 Paragraph 18.

5 Q Okay. Would you characterize any of these provisions as
6 unusual?

7 A No.

8 Q Can I direct your attention to Paragraph 6, please, Mr.
9 Niemann, that you can find that on Page 16 of 40 of the
10 exhibit?

11 A Yes, sir.

12 Q Are you with me?

13 A Yes.

14 Q Okay. Can you please explain the treatment of multiple
15 transactions as set forth in the engagement letter?

16 A Yeah. This is what's intended by this language. And I
17 will admit it's not the best-written provision and we've just
18 never got it any better-written. But the intention here is we
19 can't get paid for the same transaction twice. It would be
20 inappropriate. We would never expect to do that. So if
21 there's some debate as to whether something is, let's say, a
22 sale transaction and a restructuring, then the way that debate
23 is resolved is if it -- if it could be both, okay, and a lot
24 of times it could be, if you're running a sale process at the
25 time you're doing a restructuring, the calculated fee that is

1 the greater is the one we get, but we cannot get both fees.

2 Q Are you familiar with the Blue Torch transaction?

3 A Yes, I am.

4 Q Are you familiar with the allegation made by the Committee
5 that Houlihan Lokey may claim multiple treatment of that
6 single transaction?

7 A Yeah. I was surprised by that, but yes, I am familiar
8 with that.

9 Q Do you consider that a valid concern on the Committee's
10 part?

11 A The reason I was surprised was because I told them point
12 blank during I think my deposition, so I was under oath, but
13 it doesn't matter, we have no intention, more importantly,
14 we've told the board and management this, we have no intention
15 of procuring an additional fee for the reinstatement, if
16 that's what happens, or impairment, or whatever happens with
17 Blue Torch. We've been paid on Blue Torch. We were paid \$1.4
18 million prepetition. We do not intend to receive any further
19 fees with respect to the treatment of the Blue Torch
20 financing.

21 Q And does that remain Houlihan Lokey's position as you sit
22 here today?

23 A It will always be our position, yes, sir.

24 Q Can you please explain the results of your firm's review
25 as to whether any of the relationship set forth in your

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1 declaration account for more than a certain percentage of your
2 firm's revenue?

3 A Yes. This was actually a request of the United States
4 Trustee here, among other requests, some of which are
5 reflected in the modified order. But one was to make sure at
6 some threshold, so we went -- I have to say, I think it's the
7 first time I've been asked to do this, so -- but we did go
8 back and check, and I am prepared to represent today, and this
9 was the request of the United States Trustee on the record,
10 that no one relationship constitutes more than 2.5 percent of
11 our annual aggregate revenue. And that, I believe, is through
12 year-end '19, and we're a March year-end.

13 Q Thank you. Is there anything in your declaration or that
14 was filed with the application that you believe is inaccurate
15 or in need of revision?

16 A No.

17 Q Okay.

18 MR. HYNES: Your Honor, I know it may be a little bit
19 unusual, but I understood from the e-mail that the Court sent
20 on Friday that it was interested in streamlining the
21 examination today. So at this point, although technically it
22 would be rebuttal questions in response to the purported
23 expert put up by the Unsecured Creditors' Committee, I would
24 just as soon get Mr. Niemann's reaction to that report out now
25 and just reserve a small amount of time, if necessary, after

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1 the Unsecured Creditors' Committee has put up their witnesses.

2 THE COURT: Mr. Leblanc?

3 MR. LEBLANC: I don't think that's appropriate, Your
4 Honor. If he's going to reserve time anyway, he should just
5 -- if he has something he needs to rebut after cross-
6 examination of Mr. Lewis, he should just put him on.

7 THE COURT: Sustain Mr. Leblanc's position.

8 MR. HYNES: Okay. Thank you, Your Honor. With that,
9 Your Honor, I have no further questions for this witness.

10 THE WITNESS: Thank you. Should I leave --

11 THE COURT: Cross?

12 MR. HYNES: Yeah, you can keep them.

13 THE WITNESS: Oh, cross, sorry.

14 THE COURT: You may proceed.

15 MR. LEBLANC: Thank you, Your Honor. Andrew Leblanc
16 of Milbank on behalf of the -- proposed counsel for the
17 Official Committee of Unsecured Creditors.

18 CROSS-EXAMINATION

19 BY MR. LEBLANC:

20 Q Mr. Niemann, I'd like to begin just by calculating the fee
21 that you would earn in this case, for the benefit of the
22 Court, under the plan that's proposed. I'd like to do that,
23 okay?

24 A Okay.

25 Q All right. So, and let me, before I do that, you filed a

1 valuation -- the Debtor filed a valuation on Friday and you
2 provided us a report with respect to that valuation yesterday;
3 is that correct?

4 A They didn't file a valuation. They put valuation numbers
5 in the disclosure statement on Friday.

6 Q Okay.

7 A And we gave you our valuation report that we shared with
8 the board.

9 Q Okay. And the valuation, just to round it off, it's
10 around \$500 million. Is that right? Total enterprise value?

11 A It's \$487.5 million.

12 Q Okay. I may use \$500 million for the ease of math later,
13 but \$487.5 million. Now, one of the exhibits in your binder,
14 the binder that you have there, is Tab 37.

15 A I'm there.

16 Q And, again, I just want to use this for the purpose of
17 seeing if we can agree at least on the math here. You
18 recognize this document, right?

19 A I believe this was one, either the original or the revised
20 version of an Exhibit A to Mr. Martin Lewis' declaration. I
21 don't know if this was the original one. I think there was
22 some error and it had to be corrected. So I don't know which
23 of those two it is. So, but I recognize -- I recognize this
24 generally.

25 Q Okay. And the reason -- you didn't include a calculation

1 in your declaration of the fees associated with this plan, the
2 plan that's been proposed, right?

3 MR. HYNES: Your Honor, objection. Outside the scope
4 of my direct. I just offered the Court the opportunity to
5 talk about Mr. Lewis' report. Your Honor decided that we
6 should put on our witnesses sequentially and then proceed in
7 that manner. And now the Creditors' Committee is asking Mr.
8 Niemann about the rebuttal report that I wasn't allowed to ask
9 questions about.

10 THE COURT: Response?

11 MR. LEBLANC: That's just inaccurate, Your Honor.
12 I'm exploring -- and I was just ask -- asking the question as
13 to why I'm using this document. I'm exploring the fees that
14 they're seeking approval of today from this Court. This is an
15 illustration of that that I'm going to walk through with him.
16 This isn't a -- this isn't an opinion of Mr. Lewis'. It's
17 just the math.

18 THE COURT: Overruled.

19 BY MR. LEBLANC:

20 Q Okay. The question I just asked, Mr. Niemann, was you
21 didn't provide a calculation, a build-up like this of the fees
22 associated with the plan that's now proposed by the Debtors,
23 right?

24 A I'm sorry. In -- at what point in time?

25 Q Well, at the time that you were retained, did you do that?

1 A We didn't have a plan when I was retained, so no.

2 Q At any point since then, have you done that?

3 A I could -- if you're asking me, could I calculate the
4 aggregate fees Houlihan would get under the plan as proposed
5 by the Debtors, the answer is, yes, I could do that.

6 Q Okay. The question wasn't could you do that. My question
7 was, have you done that?

8 A I probably do it every day, yeah.

9 Q Okay. And have you presented that to the board in this --
10 the board of the company?

11 A Yes, we've discussed it.

12 Q But have you presented a calculation to the board of the
13 company of what the -- what Houlihan's fees would be under the
14 plan that's proposed?

15 A If your question is, have I presented in writing a
16 presentation to the board, the answer is no. Have I presented
17 to the board the quantum of our fees, the answer is yes.

18 Q Okay. Now, let's just walk through what you have there in
19 front of you, Exhibit -- Debtors' Exhibit 37. The first
20 column, let me just use the column on the left. Do you see
21 that? Assumes an emergence by September 11, 2019. Do you see
22 that?

23 A I don't. I'm sorry, where?

24 Q In the black.

25 A Oh, the black? I was looking to the left column.

1 Q Fees Assuming Confirmation.

2 A You're saying the far right column is the left.

3 Q I'm sorry.

4 A Yeah.

5 Q The two substantive columns on --

6 A I see that, yes.

7 Q Okay. All right. And so, just using that, the first item
8 there is prepetition monthly fees, \$460,000. Is that
9 accurate?

10 A I'd have to go back to my declaration, but it sounds
11 directionally correct.

12 Q Sure.

13 A And then \$1.4 million for the Blue Torch facility
14 prepetition. Is that right?

15 A It wasn't a debt, but yes, there was a Blue Torch
16 prepetition term loan that funded the day before Chapter 11,
17 and we were paid two percent on that \$1.4 million.

18 Q And the, again, the next line is postpetition fees only.
19 Do you see monthlies there of \$946,000? Do you see that?

20 A I do see that.

21 Q Does that seem in the right range? Before crediting?
22 Crediting is down at the bottom. Before crediting?

23 A I'm assuming that's six months less crediting, because it
24 would be a round number. It's two hundred grand times -- I'm
25 assuming 9/11 is 180 days. I don't like that date, but 9/11.

1 I'd rather say 9/12 or 9/10. So I'm assuming what you're
2 doing here or what Mr. Gal -- I'm sorry, Mr. Lewis did was 180
3 days because that's when our pace premium terminates. So 180,
4 which is roughly six months, times 200 is a million two, so
5 there must be some credits driving it down. That's what I'm
6 guessing.

7 Q All right. We'll let him deal with that. But, generally,
8 I just want to try to get a sense for the Court of the order
9 of magnitude of the Houlihan fee. The next line is the
10 recapitalization transaction fee. Do you see that?

11 A I do.

12 Q That's the \$6 million requested plus the 15 percent speed
13 premium, right?

14 A We call it a pace premium, but yes, it's 1.15 times six.

15 Q Okay. And so, that is \$6.9 million, right?

16 A That is correct.

17 Q All right. And then the next fee is the financing fee for
18 the exit ABL, because the plan contemplates a \$150 million
19 exit ABL; is that right?

20 MR. HYNES: Object to the form of the question. Your
21 Honor, object to the form of the question.

22 THE COURT: Do you want to just restate your
23 question?

24 MR. LEBLANC: Sure.

25 BY MR. LEBLANC:

1 Q Does the plan contemplate an exit ABL of \$150 million?

2 A It contemplates that we will explore that raise. It's not
3 definitive that it will be \$150 million. Could be less,
4 frankly. But the plan speaks to the potential of \$150 million
5 ABL being raised.

6 Q Okay. And if you do raise it, at least until this
7 morning, until the 30 percent reduction that was described to
8 Court -- in the court this morning, that \$3 million number
9 there, that's an accurate calculation if that ABL is raised,
10 correct?

11 A That's not correct. It's 1.4 percent on \$150 million.

12 Q Well, and my -- before you reduced it by 30 percent, the
13 \$3 million that was there, it was two percent times 150,
14 correct?

15 A But it's -- correct, but it's now 1.4 percent.

16 Q Okay. And you have -- you agreed to that yesterday; is
17 that what I understand?

18 A We've been discussing this with the restructuring
19 committee and management, frankly, certainly in earnest over
20 the last week or so since your objection has been pending, but
21 we've always told them, if there's ever a need for us to
22 discuss things, we'll discuss it, as I do with every client.
23 So I don't know, I guess arguably it's been sort of out there
24 as a possibility, not these percentages and with any
25 precision, but the possibility that we would revisit our fee

1 if we ever had to.

2 Q All right. But when you say it was out there, it was out
3 there between you and the restructuring committee, right?

4 A I let every one of my clients know: If there's ever an
5 issue with our fee, we will discuss it.

6 Q Okay.

7 A Because you can't document everything in an engagement
8 letter.

9 Q Let me just try to -- let me try to cut through it. We
10 didn't know about it until Mr. Califano announced it in court;
11 isn't that right?

12 MR. HYNES: Objection. How could he know that?

13 THE COURT: Overruled.

14 THE WITNESS: I attempted to engage with you guys,
15 certainly in earnest over the last month, ever since you
16 indicated that you were going to object to our fee. Several
17 e-mails, several attempts. And you chose not to take me up on
18 it. So I don't know if you knew. I wanted to share with you
19 the possibilities, but you never took me up on it.

20 MR. LEBLANC: Your Honor, move to strike as
21 nonresponsive.

22 THE COURT: Sustained.

23 MR. LEBLANC: Okay.

24 BY MR. LEBLANC:

25 Q You didn't tell us that you were agreeing to reduce your

1 fees before it was stated in open court today, correct?

2 A That's an arrangement between Houlihan and the company.

3 So, no, I did not tell you.

4 Q Fair enough. Okay. So let's just use the numbers that
5 are on the page, which reflect the agreement that we were
6 aware of until 9:15 or so this morning.

7 So the next one is the Blue Torch exit facility, and
8 that's the one that you're saying definitively that you would
9 not take today, correct?

10 A I think I said definitively during my deposition by Mr.
11 Stone that I wouldn't, but yes, I'm still definitive about
12 that today.

13 Q Okay. And then the next line is the rights offering. And
14 that's the -- under the plan, there's contemplated a \$70
15 million rights offering, correct? And I know it's been
16 apparently withdrawn. We haven't seen that, but Mr. Califano
17 has said that. But as of yesterday, there was proposed the
18 possibility of a \$70 rights offering, correct?

19 A It's -- as of yesterday, but not as of today.

20 Q Okay. And on that proposed rights offering, if it
21 happened, you would earn a fee of \$4.2 million. Is that
22 right?

23 A It was six percent. It's now 4.2 percent. But, yes.

24 Q Okay. And then there's the issue of the crediting of
25 monthly fees. So, with the exception of the \$1.4 million Blue

1 Torch postpetition financing facility, the calculation here of
2 \$16.2 million, that's accurate for the fees that Houlihan
3 would earn, minus the \$1.4 million; isn't that right? Prior
4 to the changes that you made today?

5 A It's just math, so -- and I haven't spot-checked the
6 credits, you know, so that 946. But trusting Mr. Galler, I'm
7 sorry, Mr. Lewis' math, this is theoretically possible.

8 Q Okay. And similarly -- well, and when you say
9 theoretically possible, this is -- these are the fees that
10 would be earned under the plan that was proposed, at least as
11 of yesterday, both with respect to your fees and the contract
12 in the plan, right?

13 A I disagree with that.

14 Q In what way?

15 A Until we get the capital in, if your clients are providing
16 the capital, they might condition the capital on certain
17 things. So, you know, there's plenty of cases where,
18 notwithstanding these theoretical fees, that the creditors --
19 if asked the question, I could testify on this -- had asked
20 the advisor, would you consider taking a lesser fee?

21 So we're always -- so this is theoretical. You know,
22 we're in the business of raising capital for our clients and
23 it's important that capital gets into the client. And so if
24 there were conditions put on that capital, we'd cross that
25 bridge when we came to it. But this is theoretically

1 possible.

2 Q Right. And if you got Court approval today under 328 of
3 these fees, not only would it be theoretically possible, it's
4 what you would be entitled to under the Court's order; isn't
5 that right?

6 A Not today, no.

7 Q If -- if the plan that was -- that proposed yesterday --

8 A I'm sorry. I misunderstood the question.

9 Q Sure.

10 A Yeah. I guess if we go back to yesterday, that's
11 theoretically possible.

12 Q Okay. All right. And then the -- I know you dispute the
13 relevance of the prepetition fee component, and we'll talk
14 about that in a bit. But the \$18.1 million, that would
15 reflect the all-in number, including postpetition and
16 prepetition fees, again, minus the \$1.4 million, right?

17 A I'm sorry. I did not understand your question.

18 Q Sure. You see, you see Mr. Lewis has a total fees earned
19 of \$18.1 million, right below the \$16.2 million? That
20 includes the pre and the postpetition?

21 A I see that.

22 Q Okay. And so if you take off the second \$1.4 million for
23 Blue Torch that we talked about that you're not seeking, that
24 would be \$16.7 million, roughly, right?

25 A I'll trust your math.

1 Q Okay. It's just math, right?

2 A I mean, do you want me to pull my -- I trust you.

3 Q No. Okay. And is it your testimony that \$16.7 million
4 would be an appropriate fee for a company to pay for the
5 services that the loan would provide if that plan were
6 confirmed?

7 A It's my testimony that our fees are market and these are
8 market fees and the structure allowing these fees are market.

9 Q Okay. And \$16.7 million -- there's no cap in your fee,
10 right?

11 A What do you mean by cap?

12 Q You don't have an agreement as to the maximum amount of
13 fees that you could earn from this engagement, right?

14 A We do not.

15 Q And you've seen caps in other cases, right?

16 A In some cases, yes.

17 Q Okay. And there's no crediting of any of the financing
18 fees against the restructuring fees in this case; is that
19 right?

20 A That is correct. My only hesitation is effectively it's a
21 discount, not a credit, but the 30 percent that we agreed to
22 with company could be deemed a credit or a discount, however
23 you want to look at it.

24 Q Okay. But there's no credit -- you know what I mean by
25 crediting, right?

1 A I think I do, yes.

2 Q Sure. Where, if you earn -- if you earn one fee, you
3 credit it against another one of your fees. So, for example,
4 if you earn a financing fee, you might credit that against a
5 transaction. You understand that?

6 A I understand it to be let's say there's a million-dollar
7 transaction, financing transaction fee and we give a 30
8 percent credit. That 30 percent, \$300,000, would be applied
9 against the restructuring fee and reduce the restructuring fee
10 by that equal amount.

11 Q Okay. Now, have you done a calculation, a similar
12 calculation to what we just did, for the plan as it existed
13 yesterday to the structure that you have now with the 30
14 percent discount?

15 A I mean, I can. I haven't.

16 Q Okay. All right.

17 A I could do it right now if you want, but --

18 Q Well, I think Mr. Lewis is going to cover that, so --

19 A Okay.

20 Q -- let's -- well, let me actually ask a couple of
21 questions along that line. The 30 percent discount that you
22 have, that wouldn't affect the prepetition Blue Torch fee that
23 you've already received, correct?

24 A No, it would not.

25 Q And that wouldn't affect the \$6.9 million transaction fee

1 that you would receive with the pace premium, correct?

2 A It only affects the financing transaction fees in our
3 engagement letter. Postpetition financing transaction fees.

4 Q All right. And the company's EBITDA last year was
5 approximately \$40 million. Is that in the right range?

6 A I'm pausing because I'm not sure it's public, what our
7 LTM. And all of this is in our valuation report, which we're
8 pretty sensitive about dissemination. But if you would like
9 me to assume for purposes of this testimony that the company's
10 trailing EBITDA is \$40 million, I'll make that assumption.

11 Q Not trailing. I was talking about 2018, which I think
12 those numbers -- maybe they're not. It doesn't matter. I'm
13 just trying to get a sense, just, again, to compare this.
14 This is something in the neighborhood of a \$40 EBITDA business
15 today. Is that generally directionally in the right way,
16 right direction?

17 A I'm happy to make that assumption for purposes of this
18 testimony.

19 Q Okay. And so is it your testimony that, as it was
20 constructed, before the 30 percent -- yesterday, when the
21 board had approved it originally, that paying \$16.7 million in
22 a fee to Houlihan is appropriate for a company with roughly
23 \$40 million of EBITDA? So, paying 40-plus percent of its
24 annual EBITDA to Houlihan as a fee, that that's appropriate?

25 A Never thought of it that way, candidly. My testimony is

1 that the rates and structure are market.

2 Q Okay. All right. Now, let's talk about the -- some of
3 the individual components. And I'm going to use the same
4 exhibit that you used, which I think is Tab 35. Just let me
5 know, Mr. Niemann, when you have that.

6 A I'm there.

7 Q Okay. So, Tab 35. This is the fee study that you
8 presented to the board, correct?

9 A Yes.

10 Q All right. And the board didn't have a separate advisor
11 providing them with fee studies to determine what was market
12 for an investment bank, did they?

13 A I don't understand your question.

14 Q Sure. Did they hire a different consultant to opine or to
15 give advice on your fee, or was this the information that they
16 received?

17 A I don't think I've ever --

18 MR. HYNES: Sorry. Object to the form of the
19 question, Your Honor. It's compound.

20 THE COURT: Overruled.

21 THE WITNESS: I don't think I've ever seen a board
22 retain a consultant to negotiate our fees or evaluate, and in
23 this case, they did not.

24 BY MR. LEBLANC:

25 Q Okay. And so -- and Mr. Del Genio didn't offer an opinion

1 on your fees, right?

2 A I don't know if he did or he didn't.

3 Q Okay. Now, the -- you mentioned a minute ago in some
4 direct -- response to some direct questions, the work that's
5 on Page -- what you said Page 3, the first page of Exhibit 35.
6 That was an analysis that you did comparing the PJT fee to the
7 Houlihan fee; is that right, generally?

8 A The purpose of this page was to provide some level of
9 comfort that the fee that PJT and Milbank asked for for PJT
10 was fair.

11 Q Okay. All right. So the page that was provided to
12 determine whether Houlihan's fee was fair, that's really the
13 second page, Page 4, right?

14 A Yes.

15 Q Okay. Now, so let me just start with the monthly fee.
16 The monthly fee that you've proposed is \$200,000 per month,
17 right?

18 A Yes.

19 Q And if you look at the -- and I forget, do you remember
20 how many, how many entries you have on this sheet? I don't
21 need you to count, but do you know?

22 A There's probably 30 or 40.

23 Q 30 or 40? Yeah. In those 30 or 40, there's only one
24 that's listed as having a fee of more than \$175,000; is that
25 right? Before you -- and we'll talk about CHC and Waypoint in

1 a second. But before you get there, in your comparable list,
2 there's only one that has a fee of greater than \$175,000,
3 right?

4 A On Page 4 -- we don't have it on Page 3, but -- I don't
5 want to speculate, but perhaps on Page 3 there's some with
6 \$200,000-plus, although I do point out that CHC and Waypoint
7 were, in aggregate, well north of \$200,000.

8 Q Okay. And let me, just to be clear about that, when you
9 say in aggregate, just so the Court understands, you're saying
10 in aggregate because there were actually two different people
11 earning a monthly fee in those cases, right? Seabury and
12 either your firm or Houlihan -- or PJT, correct?

13 A Yes. Seabury was a co-advisor in each of those. We don't
14 have a co-advisor here.

15 Q Okay. But -- and I just looked at Page 3. I don't see
16 one there, unless I'm missing it, that has a monthly fee over
17 \$150,000. And there's only one on both pages that has a fee
18 of over \$175,000, right?

19 A I think you pointed that out.

20 Q Okay.

21 A Yeah, the industrial company that we kept anonymous.

22 Q Right. And so -- and I did have a question about that.
23 The industrial company you kept anonymous, why did you keep it
24 anonymous?

25 A Because it's not a public engagement letter because we

1 kept that company completely out of Chapter 11 and got 100
2 percent consents. PJT was the advisor for the company. I was
3 the advisor for the secured noteholders.

4 Q Okay. So that was an example of a company that didn't
5 have to come before a court asking for approval of its
6 investment banker fees, right?

7 A No, they did not. We never filed Chapter 11.

8 Q Okay. All right. And so -- and what you do at the bottom
9 -- and, again, at the very bottom, you calculate a market mean
10 implied fees, and you determine what the percent of debt, cost
11 of the monthly fees are for each of these companies, and then
12 you aggregate them in a mean and a median; is that right?

13 A Yes.

14 Q Okay. Now, did you reach a --

15 A I think we just had mean on this. Oh, yeah, median is on
16 this, and then we brought the mean down. But, yes.

17 Q Okay. Did you determine that the monthly fees were
18 correlated to the size of the debt?

19 A That's a way to look at it.

20 Q Well, but did you -- did you statistically determine that
21 there is a correlation between them?

22 A There is.

23 Q Okay. If you look at it -- as I look at the list, and
24 you've helpfully organized it from smallest to largest on
25 this, right? That's how it's stacked, right?

1 A That's how I organize it, yes.

2 Q Okay. And so by organizing it that way, we can see that
3 the smallest company on the chart of -- I -- Everywhere -- I
4 didn't bring my glasses, so I'm going to -- correct me if I
5 get this wrong, but Everywhere Global has a percent of debt of
6 .042 percent and the largest company has a percent of debt of
7 .019, right?

8 A Correct.

9 Q And you can see, just by eyeballing it, you can see that
10 the bigger the company gets, the smaller that percentage of
11 fee becomes. Isn't that right?

12 A That's the correlation, yes.

13 Q Okay. So, in fact, it's not correlated to the size of the
14 debt, though. Isn't that right?

15 A I disagree with that.

16 Q Okay. Well, if you look at the companies that are
17 comparable in size to what you opine that the prepetition debt
18 here is, if we just look at the companies that are from \$750
19 million to \$796 million.

20 A Do you mind if I just -- let me find -- seven hundred --
21 I'm sorry, what was the number? Seven --

22 Q \$750 million.

23 A Okay. I see that.

24 Q So that's the Woodbridge Company, --

25 A Yes, sir.

1 Q -- down to Aspect. Do you see that? And let's -- let's
2 --

3 A Yeah. To the bottom one, yes.

4 Q Let's just exclude -- I mean, you can do with it what you
5 want, but --

6 A No, I just wanted to know which ones you're talking about.

7 Q Sure.

8 A I got it.

9 Q So, from that list, there's -- if -- the only ones that
10 came before a court asking for approval of a fee higher than
11 \$150 million was the Patriot Coal Company, asking for a fee of
12 \$175 million, correct?

13 A My hesitation is I don't know if it was the ask or the --
14 I think these are actual court orders. So it might have been
15 a higher ask, is my only reservation with your question.

16 Q Okay.

17 A But the court order that we reviewed approved a fee of
18 \$175,000 a month in Patriot Coal for Centerview.

19 Q Okay. And, but for each of the other ones, the orders
20 that you approved -- approved -- the ones that had orders only
21 approved a fee of \$150 million, right?

22 A With the exception of PJT's and the industrial company.
23 Oh, I'm sorry, you're asking in court?

24 Q In court. Yeah.

25 A That is a correct statement on this sample set.

1 Q Okay. All right. And so you determined, in looking at
2 that, that the market was \$200,000 a month for monthly fees
3 based upon your analysis; is that correct?

4 A That's not what I determined and that's not my testimony.

5 Q Okay. Is it your testimony that your monthly fee is a
6 market fee?

7 A My testimony is we are paying -- being paid \$200,000 a
8 month. It is fair for the work we're doing. And, yeah, I
9 guess I would testify it is market.

10 Q Okay. Well, that -- then --

11 A I misunderstood your question.

12 Q Fair enough.

13 A Sorry.

14 Q Now, I want to talk for a second about the debt
15 calculations that you have on here. One of the companies you
16 have is -- you do show CHC and Waypoint. For CHC, you show a
17 debt -- prepetition debt of \$1.102 billion. Do you see that?

18 A I do.

19 Q Mr. Del Genio was the CRO in CHC, correct?

20 A He was.

21 Q Did you look at his declaration in that case as part of
22 this?

23 A No.

24 Q Do you know what his declaration says about the size of
25 the debt?

1 A I suspect it's \$500 million dollars higher, give or take.

2 Q Okay. And why do you suspect that?

3 A Because that's probably the ABL that we, Houlihan, handled
4 on behalf of the company, since we're the new sponsors. So I
5 am aware that I think it's in the neighborhood of \$1.6 billion
6 --

7 Q Okay.

8 A -- as opposed to \$1.1 billion.

9 Q Okay. But you used \$1.1 billion for your calculations?

10 A I did.

11 Q And if you'd used \$1.6 billion, that number would have
12 come down, correct?

13 A It would.

14 Q And why didn't you use it?

15 A Because PJT didn't really handle that part of the case.
16 They handled other aspects of the case.

17 Q But you're -- you're comparing the amount of debt on the
18 company's balance sheet to -- or the amount of debt on the
19 company to the fees that are earned by its advisors, right?

20 A Yes. This is judgment on my part. For instance, in CHC,
21 Seabury handled the lease negotiations to a point, then we
22 took it over. In this case, we're handling the lease
23 negotiations, so I include it.

24 I don't know that I made that judgmental decision on any
25 other comp, but CHC I'm familiar with. I was in CHC. So I

1 made that judgmental decision. But you are correct. If you
2 used \$1.6 billion, it would lower the percentage.

3 Q Okay. And -- but you didn't use \$1.6 billion, you used
4 \$1.102 billion, which was a year-old number, right?

5 A I don't understand your question.

6 Q That was -- that was not the number that the company had
7 when it filed for bankruptcy and when it sought approval of
8 its --

9 A If you exclude the ABL, I think it was.

10 Q Okay.

11 A That's my point.

12 Q All right. If you excluded some portion of the debt on
13 their balance sheet?

14 A The portion of the debt that they, frankly, weren't really
15 handling, yes.

16 Q Okay. Now, another issue that is addressed here is you
17 actually use, for -- for PHI, you use a prepetition debt
18 amount of \$761 million, right?

19 A Yes, sir.

20 Q And that includes three components. One is the \$500
21 million prepetition note facility, right?

22 A Yes, sir.

23 Q The second is a \$130 million Thirty Two loan facility from
24 Mr. Gonsoulin, correct?

25 A Yes. I'm sorry.

1 Q From Thirty Two Investments. I'm sure that's what the
2 objection was.

3 And the third, you add to -- you add to PHI's prepetition
4 debt balance the cost of -- the aggregate cost of operating
5 leases for its aircraft. Is that right?

6 A It's the nominal amount of the operating leases. It's
7 actually give or take 130. We actually -- at the time we did
8 this, we had a couple of other leases, I think, in that
9 ultimately were not part of the Debtors. So the number is a
10 little less now. But those are the three primary components.

11 Q Okay.

12 A Or three components.

13 Q All right. And you know that Mr. Lewis, in his analysis
14 -- and I'm not -- I'm just going to ask you this. Well, let
15 me actually withdraw that.

16 The Debtors represented to this Court in their first-day
17 declaration that their prepetition debt balance was \$630
18 million plus the Blue Torch facility, correct?

19 A I don't -- I mean, that -- if you exclude the leases, that
20 is the amount. I don't know what the Debtors represented. I
21 mean, you'd have to point me to the document you're referring
22 to or --

23 Q The Debtors' books -- the Debtors' financial reporting,
24 that doesn't report those operating leases as debt of the
25 company, does it?

1 A I think it's reported as obligations.

2 Q Okay. But it's not reported as debt in the same way that
3 the notes are?

4 A That's correct. It's not.

5 Q Okay. And your fee study, you didn't make any effort to
6 determine what the comparable operating lease obligations were
7 for any of your comparable companies; is that right?

8 A I only know of CHC as involving a significant
9 restructuring of leases. I don't know if any of these other
10 30-plus comps had that component of the restructuring. So I
11 did not go back and check every one of these to see was there
12 a big lease restructuring negotiation. And, again, like if it
13 was a retailer, I wouldn't do that, because that's -- you're
14 not -- it's not the same type of restructuring. These leases
15 are very specialized. This equipment is very specialized. It
16 takes a very specialized advisor to handle it. That's why
17 Seabury, for instance, has been in some of these other cases.
18 They have that specialized experience.

19 Q Okay. Well, let's just talk about CHC for one second.
20 CHC leased 163 of their 230 helicopters; is that right? Is
21 that consistent with your recollection?

22 A It was a high percentage.

23 Q All right. And do you know that they reported \$1.3
24 billion in nominal value of operating leases?

25 A I don't know, but I bet it was a big number.

1 Q And had you included that in addition to the \$1.6 billion,
2 that would have been more like \$2.9 billion worth of debt in
3 the CHC case; is that right?

4 A That -- if you're correct on the numbers, I have no reason
5 to doubt you, --

6 Q Yeah.

7 A -- then all that math would hold true.

8 Q All right. And oil -- and I know this may not -- these
9 may not be your industries, but oil and gas companies, they
10 lease land, correct?

11 A Yeah. They purchase leases.

12 Q Right.

13 A Whether it's land or under the ocean floor, onshore,
14 offshore, or wherever they're getting them, but, yes.

15 Q And you didn't go back to determine how much the operating
16 lease -- how much of those operating leases should be included
17 in their debt numbers, right?

18 A I wouldn't, because those aren't typically a core part of
19 a restructuring. It's really the funded debt. So the answer
20 is no, I didn't, but there's a reason.

21 Q Okay. And similarly, you mentioned retailers. Retailers
22 routinely deal with leases in bankruptcies, right?

23 A Completely different animal, but that's correct.

24 Q All right. And you didn't make any effort to include
25 those lease obligations as part of the debt for those

1 companies, right?

2 A I wouldn't.

3 Q Okay. And then, lastly, you were here at the first-day
4 hearing. I think it was Mr. Califano who said that REFCO was
5 the -- probably the one lease that they're going to reject.

6 Do you recall that?

7 A Is that Regions?

8 Q Regions Finance, yeah.

9 A I remember him saying that, yes.

10 Q Okay. And does -- assuming that to be true, whatever --
11 whether it's true or not, is lease adjustment going to be a
12 significant part of the case for the Debtors?

13 A I would say it's material.

14 Q Okay. And thus far the Debtors have filed one motion to
15 reject a helicopter lease, right?

16 A I think it was Regions, if I'm not mistaken.

17 Q Right. And that's one out of 17 helicopter leases, right?

18 A Yeah. It's 15 lessors. I think it's 17 leases. I think
19 that's correct.

20 Q But notwithstanding the fact that you didn't -- your study
21 compares the prepetition debt amounts for everybody other than
22 your subject company; is that fair to say?

23 A I'm sorry, I didn't follow that question.

24 Q Sure. Your fee study, what we're looking at here at
25 Exhibit 35, Page 4, it compares the funded debt amounts for

1 each of your subject companies. Let me just stop there. Is
2 that right?

3 A It doesn't compare them. It has the funded debt amounts
4 as of the petition date --

5 Q Right.

6 A -- for each of the comps.

7 Q Okay. And, but for PHI, and only for PHI, you also added
8 to the funded debt the nominal value of the lease obligations.
9 Is that right?

10 A PHI -- yes.

11 Q Okay.

12 A And I'm sorry. I thought you said CHC. PHI, we added the
13 nominal amount to arrive at \$761 million. That's correct.

14 Q And you did it only for PHI, the subject of your study?

15 A Yes, sir.

16 Q Okay. And if you hadn't done that, am I right that each
17 of the numbers as to what -- the 204 that you calculated as
18 the market mean implied fee, if you used, instead, 631, and
19 multiplied it -- even if you multiplied by that mean, that
20 would result in a lower number, right?

21 A Yes. I could do the math if you'd like me to.

22 Q Why don't you do the math? Let's do the math on that one.

23 A You're using 631?

24 Q 630, but I think -- 630.

25 A Okay. I'll use 630, then.

1 Q Yeah.

2 A Times the mean, let me find it, of .027.

3 Q Right.

4 A That would imply -- I think it's \$170,000. I'm a decimal
5 point off. \$170,100.

6 Q Okay.

7 A Does that agree with your math?

8 Q That does. Yeah.

9 A Thank you.

10 Q Okay. And similarly, the -- if you did the same exercise
11 with respect to the restructuring fee -- we don't have to do
12 it, just in the interest of time -- that would similarly come
13 down if you excluded the capital lease obligations -- or, I'm
14 sorry, not the capital lease obligations, but the operating
15 lease obligations, right?

16 A If you lower the constant, which is petition date debt,
17 then the aggregate would go down, because you're applying a
18 fixed -- the percentage is a constant as well. But, yes,
19 mathematically, it would come down.

20 Q One of the companies that isn't included on here is
21 Erickson. Why is that?

22 A That was a -- I'm trying to think why I excluded it. I
23 was involved in that as well, as was Judge Hale. We received
24 the same fee as Imperial, the advisor there. I want to say it
25 was \$2 million for each of us. We really kind of worked that

1 deal together, collectively. We made a lot of progress
2 prepetition.

3 And so that deal I would view the aggregate fees -- and it
4 was a very efficient case, if I remember correctly -- I view
5 those aggregate fees as sort of the debtor-side fees, even
6 though we were representing a secured creditor, but it was a
7 very consensual and efficient case. And so I don't -- I'm
8 trying to remember, candidly, whether I purposely said, let's
9 keep it off. I think I -- I might have actually applied
10 judgment on that one. I'd use four million. I'd use the
11 aggregate of the two.

12 Q Okay. There, Erickson was -- I'm sorry, Imperial was paid
13 a monthly fee of \$125,000?

14 A I don't remember. It sounds directionally correct. And I
15 don't remember the aggregate debt. It may not have met the
16 \$300 million. I think it did, but I don't remember if it --

17 Q Does \$561 million sound correct to you?

18 A Okay. Then, then it would. It would fall within this
19 range.

20 Q Okay.

21 A Yes, sir.

22 Q And the -- Imperial's fee there you said was a \$2 million
23 transaction fee, right?

24 A Yeah, with all this -- yes, if I remember correctly.

25 Q And they also had a cap on the total fees they could earn

1 of \$3 million. Do you recall that?

2 A I don't recall that.

3 Q Do you dispute that? If I represent to you --

4 A I'd have to look at their engagement letter.

5 Q Okay.

6 A But I remember negotiating their fees on behalf of the --
7 their secured lenders.

8 Q Okay. Now, I was next going to talk about the
9 restructuring fee, the \$6 million fee that you've requested,
10 but I think we've -- that's calculated in the same way that
11 you did the -- that we just walked through on Exhibit 35, Page
12 4. Is that right?

13 A It's analyzed the same way, yes.

14 Q Analyzed the same? Okay. And so to the same extent with
15 respect to the -- if you excluded the capital leases where you
16 added the additional debt at CHC, it would have the same
17 effect on the analysis?

18 A Mathematically, mathematically, you would be using a
19 different debt level.

20 Q Okay.

21 A Or obligation level.

22 Q All right. Now, let's talk about the financing fees.

23 You, in this analysis that you presented to the board that's
24 reflected in Exhibit 35, you don't include any analysis of the
25 comparable financing fees in other cases. Is that right?

1 A Yeah, this did not have that.

2 Q Right. And in this case, and we've looked at it through
3 Mr. Lewis' Exhibit A -- 30 -- Page -- Tab 37.

4 A I'm sorry. Do you want me to go to another tab?

5 Q If you want to look at Tab -- I'm just -- I'm reminding
6 you that we talked already about the aggregate fee under the
7 plan, at least as it was formulated yesterday, and your fee as
8 it was yesterday. Do you recall that?

9 A Do you want me to go to thirty --

10 Q Sure. Go, go to 37.

11 A I'd rather not try to recall testimony --

12 Q Oh, no. That's fine. Go to 37.

13 A -- in the midst of testimony, if you don't mind.

14 Q Go to Tab 37.

15 A So, yes, I'm at Tab 37.

16 Q Okay. And the only reason, the point I wanted to make
17 here is we calculated, if you exclude the Blue Torch facility,
18 a second financing fee on that, an aggregate fee under the
19 plan as proposed yesterday and your -- and the fee as it was
20 approved by the board of \$16.7 million. Do you recall that?

21 A It is theoretically possible, depending on the capital
22 raised and the length of the case, that you could get to this
23 level of fees.

24 Q Okay. Now, and of that component, the financing -- I'm
25 sorry. The financing fees make up more than half of that

1 total potential fee; isn't that right?

2 A Well, it's 6.9 million, plus prepetition, plus monthlies.
3 Whatever that equates to. And the rest are financing fees.

4 Q Okay. So, at a minimum, do you see that there's -- for
5 the two, the ABL and the rights offering, there alone there's
6 \$7.2 million in fees for those two alone?

7 A I'm sorry. You're referring to which two numbers?

8 Q The \$3 million and the \$4.2 million. Those are financing
9 fees?

10 A \$3 million and \$4.2 million equals \$7.2 million, yes.

11 Q Okay. So, that, those fees themselves are higher than the
12 transaction fee that Houlihan is requesting standing alone,
13 right?

14 A Mathematically, yes.

15 Q Okay.

16 A They don't exist anymore, but mathematically, yes.

17 Q And, but you still -- you didn't present to the board any
18 analysis of the -- in the comparable set of what the financing
19 fees were for those comparable companies, did you?

20 A The reason I'm pausing, I'm trying to think. We did
21 present -- it was just M&A fees, because there were two more
22 pages that were presented, I don't know if you guys have it,
23 but regarding public company M&A fees. I don't think any of
24 our analyses had financing fees laid out.

25 Q Okay. And similarly, we talked about this earlier, but

1 you don't have crediting in your engagement letter with
2 respect to financing fees. You also didn't show how any of
3 the comparable companies, what crediting mechanisms were in
4 place in those cases, did you?

5 MR. HYNES: Objection.

6 MR. LEBLANC: Let me, let me rephrase it, if that's
7 all right, Your Honor.

8 THE COURT: All right.

9 BY MR. LEBLANC:

10 Q You didn't show the board, in your fee study analysis, the
11 crediting mechanisms in each -- in any of the comparable
12 companies that you included, did you?

13 A That's not on page -- on the pages we provided the board,
14 no.

15 Q Okay. And you know that in some of these cases there are
16 crediting mechanisms, right?

17 A Yes, I'm aware of that.

18 Q Okay. Similarly, you did not show the board any data
19 about the caps that were negotiated in other cases; is that
20 right?

21 A It's not on the pages that were given to the board.

22 Q Okay. And, again, you don't have a cap, but you know
23 there are caps in many of these other cases, right?

24 A You'd have to define many, but there are caps in some
25 cases. Yes, sir.

1 Q Okay. Now, let's talk for a minute about what you
2 describe as the pace premium. Have you identified any case
3 that you're not involved in that has a pace premium?

4 A Yes.

5 Q What case?

6 A I believe it's *UCI International*.

7 Q Okay.

8 A And -- if I may finish the answer?

9 Q Sure.

10 A There are what I would consider effectively pace premiums
11 where, if things are done efficiently out of court, that
12 there's either bonuses or fees are paid prepetition, and, for
13 instance, the restructuring fee might get paid once you get
14 the consents from the holders, even though a Chapter 11 is
15 required to bind the consents. So a lot of times bankers will
16 get the full fee or some percentage of the fee prepetition,
17 not subject to disgorgement later, whether or not the deal
18 clears. So that I consider, in some respects, a pace premium.
19 And it's fairly standard.

20 Q You say a pace premium is fairly standard?

21 A The structure I just described which I believe is
22 effectively a pace premium is fairly standard.

23 Q Okay. But, and you identified at your deposition a few
24 cases that you understood or recalled had pace premiums,
25 right?

1 A I'm sorry. During my deposition?

2 Q Yes.

3 A Yes, I do recall that.

4 Q Okay. And the Debtors have conveniently attached those.
5 So if you could look at Page -- Tab 38.

6 A I'm there.

7 Q All right. And Tab 38 is an application that was filed by
8 Houlihan in *Erickson Retirement Communities* with Mr. Califano
9 as counsel to the Debtor there; is that right?

10 A Yes, I'm familiar with this and that's correct.

11 Q Okay. And the pace premium there is reflected on Page 8.

12 A Page 8 of the application?

13 Q Yes.

14 A I'm there.

15 Q Okay. And in Paragraph 17, Sub-bullet D. Do you see
16 that?

17 A Yes, sir.

18 Q Okay. And so there it says the restructuring transaction
19 fee shall be increased by 15 percent if the company
20 consummates a restructuring transaction on an out-of-court
21 basis or pursuant to a prearranged or prepackaged plan in
22 which the restructuring transaction is confirmed in not more
23 than six months from the petition date. Do you see that?

24 A Yes, I do, sir.

25 Q And so that pace premium there was limited to a case in

1 which there was a prearranged plan; is that right?

2 A That's not correct. You'd have to look at the engagement
3 letter as to the definition of prearranged or prepackaged.
4 The definition is, so long as a plan is confirmed within 180
5 days, the pace premium is triggered.

6 Q Okay. So the prearranged or prepackaged as used in that
7 that was presented to Judge Jernigan, that's surplusage? It's
8 just any plan had to be confirmed within six months?

9 A You have to actually look at the engagement letter as to
10 what the precise definition is. This is an application.

11 Q Okay. And was -- do you recall whether -- was there any
12 objection to that pace premium?

13 A I don't recall. We had 30-some-odd lenders. They
14 objected to a lot of stuff. But I don't remember if this was
15 one of it, or one of the things they objected to.

16 Q Okay. So, similarly, in -- behind Tab thirty -- and that
17 was -- that pace premium was a case that you were the lead
18 banker on, right?

19 A Yes, I was the senior officer at Houlihan on that case.

20 Q Okay. *Linden Ponds* has the same structure as the -- the
21 same language with respect to prepackaged or prearranged,
22 right?

23 A I'm sure it does. You want me to go to it, or --

24 Q If you want to. Or do you doubt that that's --

25 A I believe it did. This is going back nine or so, ten

1 years ago, but yes, --

2 Q Sure.

3 A -- I'm pretty sure it did.

4 Q And then the third one that the Debtors have included is
5 *SandRidge Energy*?

6 A Yes, sir.

7 Q Okay. And that one has a premium if the transaction is
8 confirmed within two and a half months of the filing of the
9 case; is that right?

10 A I'd have to go --

11 Q Sure.

12 A -- refresh my recollection, but --

13 Q That's fine. Tab 42.

14 A -- I was involved in that. I'm sorry. It's 42?

15 Q 42, yeah.

16 A Yes, sir. If -- I think it's (b) (1) (A) on Page 7. I
17 think that's right. I'd have to take a closer look. I'm
18 sorry, what's your question?

19 Q My question is, that -- the pace premium there was a
20 premium payable if a confirmation order happened in less than
21 two and a half months from the filing, right?

22 A I'd have to go back and figure out what -- well, let's
23 look at --

24 Q Paragraph 4 on Page 3.

25 A Does it have a petition date?

1 Q It does.

2 A Okay. So I'm going to trust you, but --

3 Q May 16th.

4 A May 16th. So, by July 1st, there was one level of
5 premium.

6 Q Okay. And that was the pace premium that was at issue
7 there; is that right?

8 A Um, (pause). My hesitation on this, this was a very
9 negotiated arrangement. The \$1.5 million discretionary was in
10 lieu of pace, but it was made very clear that pace was
11 important. So they're both really -- there's only one that's
12 a pure pace premium. The other is a discretionary premium
13 generally, but pace was an important factor.

14 Q Okay. Now you mentioned *UCI*, and I'm not going to -- I'm
15 actually not --

16 MR. LEBLANC: I won't talk about that, because, Your
17 Honor, this gets to one of the document issues that we had.
18 The Debtors' exhibit list identifies this as an application to
19 employ Houlihan Lokey in *UCI*. And my team literally spent a
20 meaningful amount of time trying to find that, because
21 Houlihan wasn't involved in *UCI*. So we'll deal with it when
22 they stand up, because we didn't get -- until I walked into
23 court, we didn't get the -- we hadn't received any of their
24 exhibit binders, so we'll --

25 THE COURT: Okay.

1 MR. LEBLANC: I won't raise it here, and we'll deal
2 with it on recross.

3 BY MR. LEBLANC:

4 Q But, so at least as of your deposition, when you
5 identified cases for us that had speed -- pace premiums, the
6 only cases you identified were ones in which Houlihan was
7 available -- was the investment banker, right?

8 A The only ones I could recall during the deposition, and
9 I'm not sure I recalled every one of them, but were ones that
10 I personally was involved in.

11 Q Okay. And you've not seen a fee study done by anybody
12 else that identifies a pace premium as a common feature in
13 investment banker engagements, have you?

14 A I have not done a survey of the types of premiums. As I
15 said, there's a fairly standard provision in a lot of
16 engagement letters that pay, from a prepetition perspective,
17 if things are done more efficiently, which is pace to me. But
18 I have never commissioned that type of a survey. I've
19 commissioned some work for this particular case, given your
20 objections, but not a broad-based survey of the market for
21 every possible, quote, pace premium, depending on how you
22 define pace premium.

23 Q Okay. And the commission of work that you did in
24 connection with this case, you've identified now *UCI*, but
25 other than the three instances that Houlihan has sought in

1 cases that you were involved in, you've not identified any
2 others besides *UCI* that actually have a pace premium. Is that
3 right?

4 A The industrial company that we talked about earlier that
5 PJT was involved in, --

6 Q Let me limit it to ones that actually filed an application
7 for approval to a court.

8 A Okay. Limited to that?

9 Q Yes.

10 A I am only aware of *UCI*, which was Moelis, and the Houlihan
11 comparables over the last ten years.

12 Q Okay. And so none of them -- had you included a column
13 for ones with a pace premium here on this chart, since those
14 don't appear, or *UCI*, I guess, actually does, only *UCI* would
15 have had a checkmark next to it for having a pace premium. Is
16 that right?

17 A I don't know. I'd have to look at that list. And I
18 didn't go back and check if any of them had pace premiums.

19 Q And you didn't -- you also didn't present that to the
20 board, correct?

21 A That is correct.

22 Q Now, I want to turn topics for a second off of -- off of
23 your fees.

24 A Thank you.

25 Q And -- well, I'm not sure you'll be thanking me, but --

1 And I just want to spend a few minutes. You -- let me
2 just try to do this in a summary fashion. You understand that
3 the Committee has raised concerns, I think Mr. Califano even
4 said it earlier today, with the Debtors' plan, right?

5 A I know in pleadings it's been called coercive, it's been
6 called a death trap. I take those as concerns.

7 Q Okay. And those concerns focus on the treatment of Mr. --
8 they include the treatment of Mr. Gonsoulin's Thirty Two loan,
9 the \$130 million loan, right?

10 MR. HYNES: Objection, Your Honor. This is outside
11 the scope. I don't know where this is going, but it doesn't
12 appear to be tied to fee application.

13 THE COURT: All right. It's certainly part of the
14 objection that's been filed. Overruled.

15 THE WITNESS: I believe in one or more of your
16 pleadings there's some reference to it not being market.

17 BY MR. LEBLANC:

18 Q Okay. But --

19 A So I don't know if that's a concern or not, --

20 Q Sure.

21 A -- but I think that's how you've characterized it.

22 Q But the treatment of that loan in the plan, that --you
23 understand that's a concern of the Committee, the fact that
24 it's being equitized, right?

25 A I'm just going by your pleadings. We haven't really had

1 any meaningful dialogue with you about what your actual
2 concerns are, so I'm just going by your pleadings. I know in
3 your pleading you said -- somebody said -- you don't believe
4 that's market.

5 MR. LEBLANC: Okay. Move to strike everything but
6 the last --

7 THE COURT: Sustained.

8 BY MR. LEBLANC:

9 Q And you understand we've raised concerns, the Committee
10 has raised concerns about the replacement of Whitney Bank with
11 the Thirty Two loan, right?

12 A You've referenced that in your pleadings.

13 Q Okay. We've also raised concerns, the committee has
14 raised concerns about the Blue Torch facility, correct?

15 A You reference that in your pleadings, yes.

16 Q And you understand that part of our position is that those
17 loans, taken together, have created a lot of leverage against
18 the unsecured creditors in this case, right?

19 A I don't know what your position is on that. It's not --

20 Q Okay.

21 A That's not in your pleadings.

22 Q All right. And we've taken the position that Mr.
23 Gonsoulin is, as the friendly lender to the company, is
24 getting better treatment than he should, aren't we?

25 A I don't know if that's your position. I haven't read that

1 in the pleadings.

2 Q Okay. You also, at the first-day hearing and subsequent
3 to that, you've heard complaints that in the prepetition
4 period Houlihan and the company didn't actually engage with
5 the noteholders themselves, right?

6 A There are such allegations in your pleadings.

7 Q Okay. And you'll recall that we've alleged that the
8 company wouldn't restrict the noteholders in the prepetition
9 period, right?

10 A I'd have to look at the exact pleading, but there's
11 allegations to that effect.

12 Q And the allegations include that what the company did was
13 engage with our -- with the advisors and provide some limited
14 diligence to the advisors, but never actually provided it to
15 the noteholders, right?

16 A I can't tell you what the advisors shared with the
17 noteholders because some of it was not MNPI, so I'm sure any
18 good advisor would share what they could. PJT meets my
19 standard of a good advisor. So I don't know what the
20 noteholders got.

21 Q Okay. But you understood that the noteholders were never
22 restricted in the prepetition period to receive MNPI from the
23 company, right?

24 A My reservation is I wasn't involved in the refinancing
25 effort that was led by UBS and Royal Bank of Canada. I know

1 there was some click-through confidentiality for the existing
2 holders that were part of that process. So I don't know if
3 there was any restriction in there. So, other than that,
4 which I can't really speak to, we certainly, not on my watch,
5 if you will, was there any confidentiality agreement with the
6 existing holders. It wasn't until the bylaws which provide
7 confidentiality, --

8 Q Okay.

9 A -- which was postpetition.

10 Q All right. And you were involved in recommending to the
11 company the course of action with respect to how it would
12 engage with the noteholders; isn't that right?

13 A I was among the advisors, yes.

14 Q And you were also involved with recommending to the
15 company how to deal with the Whitney Bank facility and the
16 upsizing of the secured facilities, right?

17 A I don't really understand that question. I'm sorry.

18 Q All right.

19 A It sounded like two questions.

20 Q All right. Let me show you a document.

21 A Can I put this away?

22 Q Sure.

23 A Make room?

24 MR. LEBLANC: May I approach, Your Honor?

25 THE COURT: Sure.

1 THE WITNESS: Thank you.

2 THE COURT: You can just bring it straight up here.
3 Thank you. Thanks a lot.

4 MR. LEBLANC: Your Honor, for the benefit of the
5 Court, the only exhibit I'm going to look at at this point
6 with Mr. Niemann is one that the Debtors originally marked
7 professionals-eyes-only. They have de-designated that as
8 confidential. I don't know -- we have exhibit binders here.
9 I don't know who's signed a confidentiality agreement, so I'm
10 -- I would hesitate to offer it to everybody, but I am going
11 to ask him questions, and if they have issues or concerns
12 about the questions, they can certainly raise it.

13 THE COURT: All right.

14 BY MR. LEBLANC:

15 Q Now, Mr. Niemann, before we turn to the exhibit in the
16 binder, you were engaged by the Debtors in September, early
17 September 2018, correct?

18 A Houlihan Lokey was. Yes, sir.

19 Q And, but prior to that, Houlihan Lokey had been subject to
20 a confidentiality agreement with the company for more than a
21 year, right?

22 A I believe that's correct.

23 Q And you had, over time, provided the company with advice
24 over time during that one-year period that you were subject to
25 a confidentiality, notwithstanding the fact that you weren't

1 engaged; is that right?

2 A I'm just careful with the use of the word advice. We were
3 spending time with the company and giving thoughts on certain
4 things. I don't really consider it advice until we're sort of
5 formally engaged --

6 Q Sure.

7 A -- and indemnified.

8 Q Your general counsel will be very happy to hear you say
9 that.

10 A Exactly.

11 Q That's not my issue. I want to focus on a couple of weeks
12 before you were engaged, you provided the company with an
13 analysis of certain strategic alternatives, right?

14 A We provided several analyses, and so if you have something
15 you want me to look at --

16 Q Sure.

17 A -- and it's dated a couple of weeks before we were hired,
18 I'm happy to look at it.

19 Q Okay. Then why don't you turn to Tab 1 in the binder I
20 just handed you?

21 A I'm there.

22 Q All right. And that document, just to identify it for our
23 record, that's a strategic alternatives proposal from Houlihan
24 Lokey dated August 22, 2018, right?

25 A It appears to be what we presented. I'm looking at -- it

1 looks like it printed a little funny on the font. But this
2 appears to be a presentation we gave on or around August 22nd.

3 Q Okay. And if we skip over the Houlihan Lokey overview and
4 go just to the --

5 A Which most clients do.

6 Q If you turn to Page 23 of this document.

7 A Yes, sir. I'm there.

8 Q And this is -- you -- this is entitled, the slide here is
9 entitled "Overview of Strategic Alternatives." Do you see
10 that?

11 A Yes, I do.

12 Q And I want to focus you for a second just on the fourth
13 one, Papa's Big Brother. Do you see that?

14 A I do see that.

15 Q All right. Papa, that's Houlihan's code term, code name
16 for this engagement. Is that right?

17 A It's the maritime sign for P.

18 Q Okay.

19 A Papa.

20 Q Okay. So Papa's Big Brother was one of the alternatives
21 that you presented, and that was to find -- it's titled Upsize
22 Revolver. Do you see that?

23 A Yes, I do.

24 Q And the first recommendation there was to find a friendly
25 source of capital to take out Whitney and potentially upsize

1 the revolver up to \$260 million. Do you see that?

2 A I do see that.

3 Q Use for either liquidity or as a carrot/stick coercion
4 against notes. Do you see that?

5 A I do see that.

6 Q Now, you did find a friendly -- the company did find a
7 friendly source of capital to take out the Whitney financing,
8 right?

9 A That is not correct. I'm sorry. Oh, the company, not
10 Houlihan?

11 Q Correct. I said the company, yes.

12 A Okay. I'm sorry. I -- yes. Yes, the company found a
13 friendly source of capital.

14 Q Right. And then ultimately the company did upsize,
15 through the Blue Torch facility, the senior secured facility,
16 right?

17 A To \$200 million, not \$260 million.

18 Q Okay.

19 A Yes, sir.

20 Q And at the time that it did the Blue Torch facility, the
21 capacity you concluded the company had was \$70 million, right?
22 Under their -- under the indentures, to comply with the
23 indentures?

24 A In talking to the lawyers and everything, we decided it
25 wasn't actually \$260 million, it was \$200 million.

1 Q Okay. So you -- and at the time you presented this on
2 August 22, 2018, you believed it to be \$260 million, right?

3 A Based on our review of the indentures, we thought there
4 might be actually additional room, and upon further analysis
5 and work with lawyers -- I think it was Jones Walker at the
6 time -- we concluded that it was \$200 million.

7 Q Right. And then at the bottom, the sort of analysis of
8 that is, Dust settles. New sheriff in senior secured
9 position. Could prove helpful later. Upsize capacity may be
10 useful currency.

11 Do you see that?

12 A I don't even need to look. Yes, I'm familiar with it.

13 Q Okay. And that new sheriff was a combination of Thirty
14 Two and Blue Torch, right?

15 A No, it was not.

16 Q Okay.

17 A This was August, sir.

18 Q Right. And the --

19 A Whitney was still in the position.

20 Q Right. And Mr. Niemann, you're recommending to the
21 company, as a strategic alternative, find a friendly source of
22 capital to take Whitney out. Right?

23 A I wouldn't view these as recommendations. These are
24 simply among the alternatives available to the company.

25 Whitney was being unfriendly, so my suggestion to the company

1 at the time was you're better off to find somebody that's more
2 friendly.

3 Q Right. And the new sheriff that's referred to in the
4 bottom line where the dust settles is the person who's more
5 friendly that would come in to the Whitney position, right?

6 A And/or upsizing it. Yes, sir.

7 Q Okay. And so, in that case, the -- it's the combination
8 of the Thirty Two loan from Mr. Gonsoulin and the Blue Torch
9 facility that upsized it? Those -- that combination is the
10 new sheriff in town, right?

11 A That's -- that's not how I thought of this when I wrote
12 that.

13 Q Okay. All right. Now, you also have, under Liability
14 Management Alternatives -- do you see that?

15 A I do.

16 Q All right. And there you have an approach with the
17 noteholders that you call that Papa's New Friends?

18 A I'm familiar with it.

19 Q Okay. And the first recommendation is ignore the notes
20 until February 2019. Right?

21 A I see that.

22 Q Second alternative is to engage with the notes to calm
23 them down, prepare for standstill upon maturity. Do you see
24 that?

25 A Yes, I do.

1 Q And those are steps that you, in fact, that the company,
2 in fact, took on your recommendation, right?

3 A That is not correct.

4 Q Okay. Well, let's look at a little bit more detail behind
5 both of them. If you turn with me to Page 40.

6 A I'm sorry. Page 40?

7 Q 40. Yeah.

8 A I'm there.

9 Q And that's the page that is -- gives more detail on the
10 idea reflected on Page 23 of the strategic alternative of
11 upsizing the revolver, right?

12 A Yes.

13 Q And the assumptions and considerations here, the last one,
14 the last bullet on the right-hand column, says, "While
15 upsizing the revolver." Do you see where I'm reading?

16 A I see it, yes.

17 Q Okay. "While upsizing the revolver only provides an
18 interim solution, it will provide significant leverage when
19 negotiating with the noteholders." Do you see that?

20 A Yeah. It's underlined, in fact.

21 Q Right. And you wanted -- that was important. That's why
22 you underlined it, right?

23 A I typically underline or bold for emphasis.

24 Q Okay. So that's something you wanted to emphasize to the
25 company?

1 A Yeah. I thought it was important.

2 Q Right. And that's, in fact, what the company did, right?
3 Upsized the revolver, brought in a new friendly source of
4 capital?

5 A It did that. I'm not sure it provided significant
6 leverage in negotiating with the noteholders, --

7 Q Okay. Well, --

8 A -- to be honest with you.

9 Q -- it did -- the upsizing portion of it happened, as
10 you've said, on the day before the petition date, right?

11 A That is when it happened, yes.

12 Q Yeah. So the leverage from that is I guess yet to be
13 seen, right?

14 A Um, --

15 Q I'll withdraw --

16 A I don't think in terms of --

17 Q I'll withdraw --

18 A I don't sit around every day thinking about how are we
19 going to get negotiating leverage. This was an observation at
20 the time.

21 Q Okay. Now, turn forward to Page 42 in that same deck,
22 which is our Committee Exhibit 1. This is the discussion of
23 Papa's New Friends, the liability management alternative,
24 right?

25 A No.

1 Q Okay. What is it, if not that? I'm sorry.

2 A Well, you have to go back. I'm sorry. What page were we
3 on before?

4 Q 23 was the summary.

5 A Yeah. There were two columns.

6 Q Sure.

7 A One's Papa's New Friends. The other is Papa's New Papas.
8 What we actually did was -- or try to do was column -- the far
9 right, #6. This page, on 42, lays out both of those columns,
10 if you will, in a certain way, and then gets into
11 descriptions, advantages and disadvantages.

12 Q Okay. I want to focus on the first two lines or the first
13 two sub-bullets there. "The company has three alternatives"
14 -- at the very top -- "in engaging with the noteholders." Do
15 you see that? Do you see where I'm reading?

16 A I see it, yeah.

17 Q Okay. "The first is ignore them until the March 2019
18 maturity." Do you see that?

19 A Yes, I see that.

20 Q The second one is, "Keep them warm. Encourage noteholders
21 to organize more formally, engage with their advisor, and
22 allow advisor to review limited due diligence materials." Do
23 you see that?

24 A I see that.

25 Q And that's what the company did, isn't it?

1 A I'm not sure I'd call it limited, but we did encourage and
2 they did get organized. We engaged with -- I'm talking about
3 Houlihan and the company -- engaged with their advisors. You
4 and, I'm sorry, Milbank and PJT. And we allowed you to review
5 due diligence. I wouldn't call it limited.

6 Q Okay. But the "keep them warm" means you're not actually
7 engaging with the noteholders themselves, right?

8 A That's not what it means, no.

9 Q Okay.

10 A That's not what was intended when I wrote that.

11 Q All right. But that's, in fact, what happened? We
12 already covered that, right?

13 A I don't think I testified. No, that is not what happened.

14 Q Okay. You --

15 A It's not at all what happened.

16 Q You didn't engage with the noteholders with any
17 confidential information, correct?

18 A We provided their advisors -- you, I'm sorry, Milbank --

19 Q Uh-huh.

20 A -- and PJT, with material non-public information and
21 material information, not limited.

22 Q Okay. But you didn't ever restrict the noteholders to
23 engage in discussions directly with them on an MNPI basis,
24 right?

25 A At least two noteholders, we tried to restrict as far as

1 the M&A process, unsuccessfully. They chose not to. That
2 would be Q and Oaktree. Don't recall if we asked any others
3 individually. And there was no further -- there was no -- we
4 testi... we went over this. There was no restriction
5 prepetition.

6 Q And just to be clear, when you say you tried to restrict
7 them as part of the M&A process, not in their capacity as
8 bondholders but as potential purchasers of the company. Is
9 that right? Or certain of the company's assets?

10 A As -- I'm not sure I understood your question, but I think
11 I can answer it.

12 Q Sure.

13 A We attempted to restrict who we understood to be the two
14 largest holders. And I'm going to blank on the time, but it
15 was probably in October or so, maybe November.

16 When I think of M&A, I think of all alternatives. So one
17 alternative was to get an anchor, if you will, out of the
18 bondholders, one of the larger holders, whether that be Q or
19 Oaktree, to participate in the M&A process. They both chose
20 not to. And I'm sure they had good reasons. I'm not saying
21 there's anything untoward about that. But there was an
22 attempt made and there was no -- there was an NDA I know at
23 least sent to Q. I don't recall if we sent one formally --
24 Oaktree might have said, don't even bother sending it. I
25 don't recall precisely.

1 Q Okay.

2 A But we certainly sent one to Q, and they declined to sign
3 it.

4 Q Right. But that was in connection with the M&A process,
5 not in connection with a restructuring of the notes?

6 A The discussion was about an equitization of their debt
7 position as they held it back then, so that, to me, is M&A.
8 M&A includes restructuring.

9 Q Okay. Okay. The last topic I want to just cover with
10 you, Mr. Niemann, is I understand with respect to -- and let's
11 go back to Tab 35 in the other -- the big binder. I
12 apologize.

13 A I'll do that. Thank you. And I am there.

14 Q I'm sorry. Tab 37. I apologize. Which is Exhibit --

15 A Yes, sir.

16 Q Debtors' Exhibit 37.

17 A Got it.

18 Q This is the calculation of the fee.

19 A I'm there.

20 THE COURT: Mr. Leblanc, which exhibit are we in?

21 MR. LEBLANC: 37, Your Honor. I apologize.

22 BY MR. LEBLANC:

23 Q Now, we calculated -- we've talked about the fees. And,
24 again, I don't -- we concluded the number, the math would show
25 \$16.7 million theoretically possible. I'm not trying to

1 restate that testimony. Just trying to orient you. Okay?

2 A Yes, it's theoretically possible.

3 Q Okay.

4 A I'm not sure you and I concluded anything, but yes, --

5 Q All right.

6 A -- it's theoretically possible.

7 Q Now, to the extent that a plan was proposed that would
8 take out the Thirty Two loan facility, then Houlihan would
9 expect to earn an additional fee on that, right?

10 A If we raised \$130 million? Is that your question?

11 Q Yes.

12 A We would get the percentages Mr. Califano articulated this
13 morning with respect to that capital, unless the provider of
14 that capital insisted on some other fee and it was a barrier
15 to getting the capital. So, theoretically possible. Yes,
16 sir.

17 Q Okay. And the -- and so if -- let's just say there's \$200
18 million of secured debt here, right?

19 A Yes, sir.

20 Q Okay. And if the -- let me take one half-step backwards.
21 We talked about your valuation, your valuation of \$487.5
22 million. That means you're opining that the future owners of
23 this company are the unsecured creditors of this company,
24 right?

25 A The plan provides for the equitization of all debt except

1 Blue Torch.

2 Q Okay. And the -- under your valuation, the fulcrum
3 security is the unsecured creditor security, right?

4 A If your definition of fulcrum is where the value runs out,
5 yes, it runs out in the unsecured class.

6 Q All right. And so if that fulcrum security raised the
7 capital to take out that secured debt, \$200 million, then you
8 would earn a fee, even under the revised adjustments? If they
9 did that in equity, that's an \$8.4 million fee on top of the
10 other fees that we talked about here. Is that right?

11 A 4.2 percent times \$200 million I think is \$8.4 million.

12 Q And that would be on top of the transaction fee, the
13 monthly fees, any other financing fees, the Blue Torch
14 prepetition fee? On top of all of that, right?

15 A There are no credits and there are no caps.

16 Q And even if the fulcrum security raised that capital as a
17 debt facility, that still would earn you a fee of --

18 A 1.4 --

19 Q One point --

20 A -- or 2.1, depending on what that one is.

21 Q Okay. What kind of debt it is.

22 A That's right.

23 Q So let's assume it's unsecured debt. It would be \$4.2
24 million on top of all these fees. And if it's secured debt,
25 it would be \$2.8 million on top of all these fees. Is that

1 right?

2 A I think that's accurate, if there were no conditions
3 placed on the provision of that capital.

4 Q And, again, just so we're clear, you're asking for
5 approval under 328, not 330, right?

6 A That is correct.

7 Q Okay.

8 MR. LEBLANC: Your Honor, if I could just have a
9 moment, I think I'm done.

10 THE COURT: Sure.

11 (Pause.)

12 MR. LEBLANC: I have no further questions, Your
13 Honor.

14 THE COURT: Thank you, Mr. LeBlanc.

15 THE WITNESS: Thank you.

16 THE COURT: Does anyone else have any questions of
17 this witness?

18 MS. KIPPES: No, Your Honor.

19 THE COURT: Redirect?

20 MR. HYNES: Yes, Your Honor. May I have five
21 minutes?

22 THE COURT: Yes. We're going to stop at noon, but
23 you can have five minutes. We'll come back in in five
24 minutes.

25 MR. HYNES: Thank you.

1 THE COURT: Mr. Niemann, don't speak with anyone
2 about your testimony. Do you understand that? And that
3 includes the lawyers.

4 THE WITNESS: Yes, I do, Your Honor. Thank you.

5 (A recess ensued from 11:29 a.m. until 11:37 a.m.)

6 THE CLERK: All rise.

7 THE COURT: Please be seated. Thank you.

8 (Continued chatter.)

9 A VOICE: Shh.

10 A VOICE: Excuse me. Excuse me.

11 THE COURT: Mr. Niemann, you don't want me to hold
12 you in contempt, do you, back there?

13 THE WITNESS: I'm sorry, Your Honor.

14 THE COURT: That's all right.

15 THE WITNESS: No, sir. That would be a first.

16 THE COURT: You may proceed.

17 THE WITNESS: Thank you.

18 MR. HYNES: Thank you, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. HYNES:

21 Q Mr. Niemann, you were just asked about your communications
22 with the noteholders. Do you recall those questions?

23 A I do.

24 Q And do you recall your communications with the noteholders
25 coming up in the objection filed by the Unsecured Creditors'

1 Committee?

2 A I do.

3 Q Did you endeavor to do any research after reading that
4 objection?

5 A I did.

6 Q What did you do?

7 A I went back through my diary, went back through my
8 electronic communications, which these days are e-mails and
9 texts, and also went back just from my own recollection to try
10 to really decipher what the level of interaction was, what
11 efforts were made with these noteholders and their advisors.

12 Q Did you memorialize the results of that effort in
13 anything?

14 A I did.

15 Q Okay.

16 MR. HYNES: Your Honor, for demonstrative purposes,
17 I'm providing to the noteholders and to the Court, if it will
18 accept it, a schedule that Mr. Niemann just referred to.

19 MR. LEBLANC: Your Honor, this is literally the first
20 I'm seeing of it. I don't know that we have -- we're going to
21 deal -- talk about this later in the 1103 issue, about the --
22 we have 456 documents produced by the Debtors. Zero text
23 messages from Mr. Niemann. Less than 200 e-mails, or around
24 200 e-mails in total.

25 I don't know what this is. We have not seen it. No

1 opportunity to cross-check it. And it's not a proper summary
2 under 1104 because the documents haven't been provided to us,
3 under Federal Rule -- I think it's Federal Rule of Evidence
4 1104. It's not a proper summary of documents because we don't
5 have them.

6 MR. HYNES: Well, that might be an objection, Your
7 Honor, if I was offering it into evidence at this time, but
8 I'm not.

9 MR. LEBLANC: It's -- Your Honor, it's no -- it's not
10 meaningfully -- that's -- a demonstrative is for that purpose.

11 THE COURT: I'll sustain the objection.

12 MR. HYNES: Okay.

13 BY MR. HYNES:

14 Q Mr. Niemann, do you recall delivering a straw man
15 restructuring proposal to Milbank and PGT [sic] on or about
16 February 22, 2019?

17 A Yes.

18 Q Can you describe that?

19 A It was a --

20 MR. LEBLANC: Your Honor, I object. The last time we
21 were here, the last time I was here, on the first-days, there
22 was strenuous objection to any mention by me of settlement
23 discussions. He's now describing a prepetition settlement
24 negotiation that they had with the Ad Hoc Committee of
25 Noteholders.

1 THE COURT: Are you going to go into terms of
2 settlement?

3 MR. HYNES: I'm happy to avoid the actual terms of
4 the settlement, Your Honor, but this goes directly in response
5 to the unfounded allegation that the Unsecured Creditors'
6 Committee were kept out of the loop and not provided with due
7 diligence for nefarious reasons.

8 But I will -- I will keep -- stay out of the actual terms
9 of the straw man proposal in response to my adversary's
10 objection.

11 THE COURT: The objection is then overruled.

12 MR. HYNES: Thank you, Your Honor.

13 BY MR. HYNES:

14 Q Mr. Niemann, do you recall the straw man restructuring
15 proposal that was provided? And I ask that question
16 specifically not asking you to disclose the terms.

17 A Yeah. It was shared with Mr. Genereux. It was a -- I
18 want to say a seven or eight-page document. It was a very
19 formal term sheet with very formal terms. I won't get into
20 the details of the terms, but it was a comprehensive plan
21 support agreement, what I would call -- we call them straw
22 men, so they can't technically be formal proposals, but it was
23 a very formal, detailed straw man.

24 Q And did that communication come out of the blue?

25 A No, sir.

1 Q Can you explain?

2 A It was, my way of thinking, my best attempt, with counsel
3 and all the other advisors and management and the
4 restructuring committee and the board, to put on the table
5 that which I thought might resonate with the noteholders based
6 on my several months of interaction with at least two of the
7 noteholders and their counsel and their advisor.

8 Q Are you familiar with the term blowout?

9 A Yes, sir.

10 Q And what does that mean?

11 A The way I think of it, and I'm sure I'm taking some
12 liberties, but is that when you share material nonpublic
13 information -- in this case, with the noteholders, let's say
14 -- at some point they are able to, quote, blow it out into the
15 market, so you put it out in the public domain, typically
16 through an 8-K of some sort, some sort of SEC reporting, so
17 that that information is now in the public domain, it is no
18 longer nonpublic.

19 Q And to your knowledge, did the company have blowout
20 concerns in connection with the straw man restructuring
21 proposal that was provided?

22 A Yes.

23 Q Can you explain those concerns?

24 A Frankly, it's the very concerns we raised at the first
25 day, and in some respects I think what Mr. LeBlanc is getting

1 at, is we -- we don't want bid-ask floating around in the
2 market. We want to be able to negotiate and know that, you
3 know, there's not going to be a public blowout of, for
4 instance, that straw man or the analytics that go into that
5 straw man or the business plan or the things that would go
6 into underwriting that straw man.

7 So, that's sacred information that we want to keep as
8 nonpublic as possible for as long as possible. Typically.

9 Q And in your experience, is it -- does whether the parties
10 are close to a deal influence the blowout concern?

11 A It always does.

12 Q And what was the case here?

13 A The best way I could --

14 Q Without -- without disclosing any --

15 A No, no, I wasn't going to. I use a football field
16 analogy, Your Honor. So, say 40-to-40. Then I'm comfortable
17 we're in the -- it's not really the red zone. I think that's
18 the 20-yard-line. But 40-to-40. And I think I actually said
19 this to the board. I believed we were at or around the 40,
20 maybe we're at the 38, to be candid. And the response we got
21 from Mr. Genereux, which was an oral response, if that's the
22 right way to say it -- it wasn't a written response; it was a
23 phone call that described what they might be willing to do --
24 I viewed as kind of down on their 20-yard-line. So we never
25 got to the point where I could tell the board and the company,

1 you know what, I'm comfortable we're within striking distance,
2 or at least getting into a position of 40-to-40, 35-to-35. We
3 never got to that point. And so it was a concern to share
4 information subject to blowout when the likelihood of a deal
5 was low.

6 Q Do you recall how close to the filing date it was when Mr.
7 Genereux responded orally?

8 A I want to say maybe two weeks. I don't remember the exact
9 date.

10 Q And did that influence the company's ability to share
11 information with the Unsecured Creditors' Committee?

12 A It was the Ad Hoc Committee, Group, I guess, at the time,
13 formally. How should I answer that? We weren't concerned
14 about Mr. Genereux -- he's a, again, he's a capable guy; his
15 team is capable -- sharing that information. You kind of have
16 to thread the needle on this stuff, share what you can, guide
17 as much as you can.

18 But we were concerned giving material nonpublic
19 information that we would not want blown out into the market
20 if we never got to a deal. And so there was, if I recall
21 correctly, a fair amount of discussion around whether or not
22 we should restrict, and if so, on what terms. It's always a
23 heavily-negotiated point.

24 Q Thank you.

25 MR. HYNES: Your Honor, I'd like to go to Exhibit 1

1 that my adversary marked at Page 23.

2 BY MR. HYNES:

3 Q Could you please pull that page out of the binder?

4 A Of the -- of Mr. LeBlanc's binder?

5 Q Exactly.

6 A I've got it. I just didn't know which binder. I prefer
7 to call him Mr. LeBlanc as opposed to an adversary.

8 Q Old habit. We -- we actually haven't met. At Page 23, do
9 you recall the questions you were asked on the overview of
10 strategic alternatives?

11 A I do, sir.

12 Q Okay. What's the first one called again?

13 A On Page 23? Let me get there. Papa's Crown Jewels?

14 Q Yes, sir. Can you explain that potential strategic
15 alternative?

16 A Yeah. Yes, sir. Again, this was August, and so we didn't
17 have the level of information we had in September, October,
18 November. As we go deeper, we get more information, kind of
19 going from 50,000 to 40,000. We were probably at 35,000 feet.
20 But I like to get down to maybe 20,000 or 15,000 feet. So
21 we're far -- a long way from that. But we certainly viewed
22 Air Medical as not subject to the same volatility and trough
23 that we're in vis-à-vis Oil & Gas. Air Medical has got its
24 own challenges, mind you, and it's a complicated business in
25 its own right. But from the outside looking in at this point,

1 back in August, we thought that that's an attractive asset
2 that certain -- certainly, strategic investors -- *i.e.*, other
3 air medical operators -- would have a high degree of interest
4 in.

5 I also believe -- this is just a view, one man's view --
6 that but for Air Medical, we might have had to explore
7 restructuring of PHI a long time ago. Just like CHC, just
8 like Erickson, just like Waypoint. So it's provided a hedge.
9 So Papa's Crown Jewel was, if we can't get anybody interested
10 in the whole thing, maybe we can sell Air Medical and pay off
11 the bonds. Maybe we can sell it for \$500 million plus. Even
12 if we can get to \$500 million, maybe we could sell it for
13 enough with maybe some upsizing that we can actually pay off
14 the bonds and not have to worry about the maturity. That --
15 and I don't -- I could go through the bullets, but that was my
16 thought process when I wrote this.

17 Q Do you know whether Houlihan Lokey or the company pursued
18 that strategic alternative?

19 A Yes. Aggressively.

20 Q And what became of it?

21 A We -- and I'm going to be a little careful with how I say
22 this. It's in the valuation report. I shared this with the
23 Equity Committee yesterday. Happy to share it in detail with
24 the Creditors' Committee. We got more than one preliminary
25 indication of interest -- I'm not saying whether it was two or

1 ten, but you should assume it's closer to one than ten -- from
2 two, two or more strategics, and they were preliminary
3 indications of interest for the Air Medical assets. We did
4 not get any indications of interest for the total company or
5 for Oil & Gas.

6 Q Thank you. So you pursued Strategic Alternative 1 with
7 the company, correct?

8 A Yes. Aggressively.

9 Q What's #2 here?

10 A Papa's New Partner is a merger of the entire enterprise,
11 Oil & Gas and Air Medical, with another strategic. And, in
12 fact, we identify -- it's all public. People know who these
13 people are. Air Methods and AMGH are air medical operators.
14 They're owned -- they're sponsor-backed, if you will. I
15 believe American Securities and KKR are the two, respectively,
16 the sponsors. I believe Air Methods at one time was public.
17 CHC, Babcock, CD&R, et cetera. Those are all the O&G
18 strategics. CHC being obvious. Babcock perhaps a little less
19 obvious. It's a helicopter operation within a much bigger
20 conglomerate that they acquired. CD&R is an equity sponsor
21 that has clearly displayed interest in this sector by virtue
22 of the fact that they were the CHC sponsor and they, for lack
23 of a better description, fought hard to hold onto their equity
24 position against what were then my clients, which were led by
25 Bain, Alliance Bernstein, and others, who are now the majority

1 equity holders of CHC.

2 So, go talk to those guys about maybe a total company deal
3 that either pays off the bonds or we have something to talk to
4 the bonds about. I'm sorry. Notes. These are notes, not
5 bonds.

6 Q Were any actions taken to explore Strategic Alternative
7 #2?

8 A Yes. We aggressively explored it.

9 Q What is Strategic Alternative #3?

10 A And by the way, if I may, within that is what I was
11 talking about earlier, per Mr. Leblanc's questioning. We did
12 talk to others than are on this page, including, without
13 limitation, QNO, Prius, Potential, sort of new sponsors, given
14 their current debt position in Papa, in PHI, and our
15 understanding of their debt position in other strategics, if
16 you will. I'll just leave it at that.

17 Papa's New Shoes. 3. Just go refinance the existing
18 debt. Existing debt being the existing notes.

19 Q Did Houlihan or the company explore the possibility of
20 Strategic Alternative 3?

21 A The company did.

22 Q And what was the outcome?

23 A There was a failed refinancing effort led by UBS, and I
24 think the co- or maybe, say, lead left, whatever it was. But
25 Royal Bank of Canada was a co-advisor in that, and it was a

1 failed refinancing effort to provide a secured loan to the
2 existing noteholders, effectively. Don't know if Q was an
3 existing noteholder at the time. I think this failure -- or
4 this, I'm sorry, I shouldn't -- this attempt was July into
5 August, if I'm not mistaken. Don't know exactly when the
6 roadshow was. And then there was an exchange offer that sat
7 out there for a while and was ultimately abandoned. I think
8 in September, if I'm not mistaken.

9 So basically it would be the existing noteholders getting
10 a secured loan in lieu of their unsecured loan, and the
11 pricing and the terms got to a point that the secured
12 noteholders, as I understand, were demanding, market demands,
13 that it would effectively not be supportable by the company.
14 They dodged that bullet only to walk into another bullet, you
15 know, nine, twelve months later.

16 Q So is it fair to say the company pursued all those market-
17 based alternatives?

18 A Yes. We were only involved in the first two.

19 Q Mr. Niemann, --

20 A We, Houlihan. I'm sorry.

21 Q You --

22 MR. HYNES: I'm mindful of the time, Your Honor.

23 BY MR. HYNES:

24 Q Mr. Niemann, you were asked about the leases on your
25 cross-examination.

1 A Yes, sir.

2 Q Do you recall that?

3 A I do.

4 Q Are the leases part of the Debtors' capital structure that
5 needs to be renegotiated?

6 A Yes.

7 Q Are you involved in the renegotiation, or your team?

8 A We are.

9 Q And can you tell me what that entails?

10 A The way I describe these restructurings, these helicopter
11 restructurings, is they're multiple restructurings. So we're
12 restructuring a lease portfolio. Frankly, Seabury, given
13 their competencies, handled that to a degree in CHC, then we
14 kind of jumped in because we were the new sponsor. But you've
15 got to -- to really underwrite new money into these deals,
16 you've got to know what the run rate EBITDA is. To know what
17 the run rate EBITDA is, or, you know, what kind of costs can
18 Mr. Bospflug and his team take out of this company, what kind
19 of costs can he take out of this company includes, without
20 limitation, if we can get concessions out of these lessors and
21 we have, let's say, I don't know, \$10 million a year in lease
22 costs now, but thanks to the Bankruptcy Code and negotiating
23 against that and what's happened in other cases, *CHC* in
24 particular, and there's other large operators out there that
25 are not doing so well, so maybe, just maybe, you can get

1 lessors to be a part of the going-forward fleet on more market
2 terms. Because all of these leases, spare perhaps the HN Zed,
3 are arguably well above market. So if we could cut that ten
4 -- and I'm not saying it's \$10 million. I'm just giving a
5 hypothetical. If we can cut that \$10 million down to \$5
6 million and then apply a multiple to that, that's enterprise
7 value. So that unto itself is its own restructuring, above
8 and beyond the notes and all the other stuff you've got to do.

9 Q And how -- remind me how long you've been working with
10 PHI.

11 A I mean, I've -- I've known Lance and then Mr. Gonsoulin --
12 Lance Bospflug -- for three-plus years. Our work in earnest
13 started in, I guess, August into September. It feels like
14 we've been working for five years in that period of time. So,
15 you know, certainly since September.

16 MR. HYNES: One minute, Your Honor?

17 THE COURT: Sure.

18 (Pause.)

19 MR. HYNES: No further questions, Your Honor.

20 THE COURT: Thank you. Mr. Leblanc, are you going to
21 have questions of the witness?

22 MR. LEBLANC: I'm sorry, Your Honor? I didn't hear.

23 THE COURT: Are you going to have more questions of
24 the witness?

25 MR. LEBLANC: Just a -- I'll be done by 12:00.

1 THE COURT: Sure.

2 THE WITNESS: Thank you.

3 THE COURT: Good.

4 RE CROSS-EXAMINATION

5 BY MR. LEBLANC:

6 Q Mr. Niemann, you were asked some questions on redirect
7 about a proposal from late February. Do you recall that,
8 those questions?

9 A The straw man, you mean?

10 Q Yes.

11 A Yes, sir.

12 Q And there's no dispute, we couldn't share that straw man
13 proposal with our clients, right? The noteholders in that
14 case, in that instance?

15 A I shared aspects of it with them. So you couldn't share
16 the document, but you could certainly share aspects. They
17 were the aspects of that that are nonmaterial nonpublic
18 information, and I shared it directly with at least two of the
19 noteholders.

20 Q Okay. But if the information that was -- if the
21 information was material and it was nonpublic, then we
22 couldn't share it? So we could only share if it was public or
23 if it was immaterial, correct?

24 A If it didn't meet the material nonpublic information
25 standard, --

1 Q Right.

2 A -- then it shouldn't be shared.

3 Q And in response to a question just a minute ago about the
4 leases, I didn't get -- you were talking pretty fast so I
5 didn't get all of it, but I think you said to really invest
6 new money you need the run rate EBITDA. Do you recall that?
7 Just --

8 A That is generally the case.

9 Q Okay. And at the time you made that proposal, you had not
10 provided a business plan to the noteholders, correct? The
11 straw man proposal, right?

12 A I don't know if that's the case. I know we had provided a
13 high -- Mr. Del Genio provided a high-level business plan two
14 days after we met with the noteholders, all the noteholders,
15 in person, in Houston. They didn't want to come to Lafayette.
16 Mr. Gonsoulin, Mr. Brass, Mr. Bospflug, the entire management
17 team, advisors. Sam was there from your shop. PJT.
18 Certainly, Mr. Singh was there. And then two days later we
19 provided a high-level, what I call an executive level, Mr. Del
20 Genio provided. And then I want to say a week or so later we
21 provided the detail.

22 I don't recall if that was before or after the straw man.
23 It was sometime around the same time.

24 Q All right. But, again, with respect to that, that was not
25 public information, correct?

1 A Again, not everything that's in a business plan is
2 material. And so, for instance, if I was your advisor, --

3 Q Okay. I mean, --

4 A -- I would look at it and I would say, some of this we can
5 share, some of it we can't. You've got to thread the needle
6 on this. So I can't answer your question that way.

7 MR. LEBLANC: Move to strike, Your Honor.

8 THE COURT: Sustained.

9 BY MR. LEBLANC:

10 Q The first meeting that the company has had with any
11 unsecured creditors -- meaning, not with their advisors but
12 with unsecured creditors -- to go over a business plan
13 happened last Thursday. Is that right?

14 A There was -- you know, I disagree with that. The
15 discussions Mr. Gonsoulin had with the senior executives at Q,
16 the discussions Mr. Gonsoulin had with senior executives at
17 Oaktree, while somewhat social, there was discussion around
18 prospects for the industry -- sector, I should call it -- and
19 then we presented information during that first meeting as far
20 as -- and they asked a lot of good questions. In particular,
21 I remember, well, both Mr. McCarty from Q, what's his --
22 Jonathan Sacks, I think it was, from Stonehill asked a lot of
23 good questions around prospects for the business.

24 So, you know, that was a business plan discussion. It
25 wasn't MNPI, but it was a discussion around the planning on

1 the business.

2 As far as formal business plan, it was what Mr. Del Genio
3 provided in two increments.

4 Q And those two increments prepetition were not provided to
5 the creditors themselves?

6 A I can't tell you what PJT and you provided to your
7 clients. I would have expected that some part of it that's
8 not MNPI would have been provided, but that's --

9 Q But only --

10 A That's just how -- I don't know what you guys did.

11 Q Only a confidential version of that was provided to us,
12 right? One that was not -- we weren't able to disseminate to
13 creditors, right?

14 A All I can tell you is, if I got that, I would not share
15 the document but I would actually share that which is not MNPI
16 to educate as much as possible to try to narrow the 40-to-40.
17 That's what I would have done.

18 Q Postpetition -- let me see if you'll agree with this, at
19 least. Postpetition, the only -- the first time the company
20 shared a projection of its go-forward EBITDA in a business
21 plan with creditors was on Thursday of last week. Is that
22 fair?

23 A I don't know if we shared it with lessors that are under
24 confidentiality. And we shared it with Blue Torch, who's
25 under confidentiality. And obviously, Thirty Two. So that's

1 not correct. We shared it with certain creditors. If you're
2 talking about --

3 Q I said unsecured --

4 A -- your clients, --

5 Q I said unsecured creditors, but let's limit it to --
6 that's fine. You met with our clients --

7 A Well, lessors are unsecured.

8 Q You met with our clients; last week was the first time we
9 had a business plan meeting. Is that right?

10 A First time we could get you in a room, yes.

11 Q You -- is it your testimony, Mr. Niemann, that we were the
12 ones that asked for -- to delay a business plan meeting until
13 last Thursday, that we wouldn't meet -- our clients wouldn't
14 meet earlier on a business plan?

15 A My testimony is we have made multiple attempts to get your
16 clients in a room and we have been rebuffed.

17 Q And on a business -- you're saying that it was our clients
18 who pushed a business plan meeting until last Thursday?

19 A I --

20 Q Or did our clients ask for a business plan meeting earlier
21 than that and it couldn't happen from the Debtors?

22 A I don't know who asked for what. I know Mr. Del Genio and
23 Mr. Bospflug hosted a management presentation for the
24 Creditors' Committee last Thursday. That's all I know.

25 Q Okay. All right.

1 A I don't know who asked for what or all that stuff.

2 Q Okay. So that's all you know, is there was a meeting last
3 Thursday?

4 A Well, I mean, I heard it went well, but, I mean, --

5 Q Okay.

6 MR. LEBLANC: I have no further questions, Your
7 Honor.

8 THE COURT: Thank you.

9 MR. LEBLANC: I apologize. 12:02.

10 THE COURT: That's okay. Does anyone else have any
11 questions of Mr. Niemann? You may step down, sir. Thank you.

12 THE WITNESS: Thank you, sir.

13 (The witness steps down.)

14 THE COURT: Can the Debtor preview me on you have
15 another witness from the Debtors' side; is that right?

16 MR. CALIFANO: Yes, Your Honor. That would be Mr.
17 Bospflug.

18 THE COURT: All right. And then the Committee has a
19 witness, or more?

20 MR. LEBLANC: Just, we have a witness live. There's
21 a page of Mr. Del Genio's deposition that we can either call
22 him to admit or just read it to the Court. We're fine doing
23 it as efficiently as we can.

24 THE COURT: All right. We'll be in recess until
25 1:30. You can leave your stuff where it is. This is all we

1 have going today. That's an understatement, I think. And I
2 think you all will be visiting over the lunch hour about some
3 of the matters that we talked about at the beginning; is that
4 right?

5 MR. CALIFANO: Yes, Your Honor.

6 MR. HYNES: Yes.

7 MR. CALIFANO: We talked about the mediation.

8 THE COURT: Okay. And anything on KEIP that is --

9 MR. CALIFANO: I think that -- I believe that --
10 that's one of the things I was running out with Mr. Simon. I
11 think that we're done on that.

12 MR. SIMON: I think we have a deal as well.

13 MR. CALIFANO: I think we have a deal, so we've just
14 got to --

15 MR. LEBLANC: To be clear, I think the U.S. Trustee
16 still has reservations, but --

17 MR. CALIFANO: We have a deal.

18 MR. LEBLANC: Yeah.

19 THE COURT: Okay. Well, if you all would visit with
20 the U.S. Trustee over the lunch hour on KEIP also.

21 MS. KIPPES: Your Honor, I have asked them to put on
22 evidence that it is an incentive plan versus a retention plan.
23 That's their burden anyway under the statute.

24 THE COURT: Uh-huh.

25 MS. KIPPES: And I believe Mr. Del Genio has agreed

1 either to testify or maybe there will be a proffer.

2 THE COURT: Okay. Thank you.

3 MS. KIPPES: Thank you.

4 THE COURT: Mr. Simon, were you going to add to that?
5 Were you going to add to that, Mr. Simon?

6 MR. SIMON: I was just going to confirm that. We'll
7 be prepared either at the -- at 1:30 or sometime thereafter --

8 THE COURT: Uh-huh.

9 MR. SIMON: -- to read the settlement into the record
10 and put a proffer of Mr. Del Genio on.

11 THE COURT: We're right in the middle of Houlihan.
12 It does not matter to me if you all want to stop that and go
13 into KEIP first. It doesn't matter. Whatever you all think
14 is the most efficient way of handling that, that's fine. All
15 right. But I do think if you talk about mediation, it will
16 also --

17 MR. CALIFANO: We will, Your Honor.

18 THE COURT: -- dovetail some into the adjournment
19 motion.

20 MR. CALIFANO: We will.

21 MR. SIMON: Yes.

22 THE COURT: All right. We'll be in recess.

23 (A luncheon recess ensued from 12:04 p.m. until 1:31 p.m.)

24 THE COURT: Please be seated, you all. Thank you.

25 MR. CALIFANO: Your Honor, if I may?

1 THE COURT: Sure.

2 MR. CALIFANO: I just wanted to say this at the
3 outset, because, you know, I know we have time constraints
4 today: Happily, we have an agreement on mediation going
5 forward that will move the -- and at the end of the hearing,
6 we'll give you the details -- but that means the 1103 motion
7 is now off. And we have a deal on the KEIP, and I would just
8 suggest that we save ten minutes or so at the end. Mr. Simon
9 will read the KEIP into the record and then put the proffer on
10 that the U.S. Trustee has asked for.

11 THE COURT: All right. Mr. Levick, did you need to
12 --

13 MR. LEVICK: Yes, Your Honor. And Your Honor, I
14 represent Cynthia [sic] Wray, a putative class action
15 plaintiff. And I had some comments about the mediation
16 motion. Would you like me to speak now, --

17 THE COURT: I think when --

18 MR. LEVICK: -- or speak later?

19 THE COURT: When we get to it, I think.

20 MR. LEVICK: Okay. Thank you, Your Honor.

21 THE COURT: Yes. Is there a lawyer for Debtor and
22 Committee that might speak with Mr. Levick while we're going
23 on the Houlihan?

24 MR. CALIFANO: Sure.

25 THE COURT: Or have you all already spoken?

1 MR. LEVICK: I have spoken to Debtors' counsel --

2 THE COURT: Oh, you have? Okay.

3 MR. LEVICK: -- and didn't quite get my way, so I
4 wanted to speak to the Court.

5 THE COURT: Oh, okay.

6 MR. LEVICK: Thank you.

7 MS. KIPPES: And Your Honor, just to be clear on the
8 KERP/KEIP motion, the U.S. Trustee may have cross after the
9 proffer. We're going to hear what the proffer says first.

10 THE COURT: That's fine.

11 MS. KIPPES: Thank you.

12 THE COURT: All right. So, did I understand we just
13 keep going with the Houlihan motion?

14 MR. CALIFANO: Yes. Yes, Your Honor.

15 THE COURT: All right.

16 MR. HYNES: Yes, Your Honor.

17 THE COURT: All right. You may call your next
18 witness.

19 MR. HYNES: Your Honor, the Debtor calls Lance
20 Bospflug.

21 THE COURT: Please raise your right hand.

22 LANCE BOSPFLUG, DEBTORS' WITNESS, SWORN

23 THE COURT: You may be seated.

24 MR. HYNES: Thank you, Your Honor.

25 DIRECT EXAMINATION

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1 BY MR. HYNES:

2 Q Mr. Bospflug, would you mind taking the binder that's
3 behind you out? All of the exhibits that we will be showing
4 you will be marked 30 and below. That will be the first
5 binder.

6 A I've got Volume I, Volume II, Chapter 11.

7 A VOICE: This volume right here.

8 THE WITNESS: Okay.

9 MR. HYNES: Thank you.

10 BY MR. HYNES:

11 Q Would you mind re-introducing yourself to the Court, sir?

12 A Yes. My name is Lance Frank Bospflug.

13 Q And can you remind the Court of your position with the
14 company and how long you've been part of it?

15 A I'm president and chief operating officer, and I've been
16 with the company since late 2000.

17 Q And do you serve on the Board of Directors?

18 A I do.

19 Q How long have you served on the board?

20 A Since 2001.

21 Q Are you familiar with Houlihan Lokey?

22 A Yes, I am.

23 Q And who are they?

24 A Investment banker, advisor, that we retained.

25 Q Are you familiar with Matt Niemann?

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1 A Yes, I am.

2 Q He just testified, right?

3 A Yes.

4 Q When did you first become introduced to Houlihan Lokey?

5 A I met -- was introduced to Mr. Niemann in late 2016 by a
6 mutual acquaintance from Sikorsky that is now with Houlihan.

7 Q And what was your impression of Houlihan Lokey at the
8 time, if any?

9 A Well, initially, I didn't know them, and subsequent to
10 late in the year we started talking. And the first thing was
11 that they produced a -- one of the most extensive reviews of
12 the rotorcraft industry that I've ever seen. So that
13 impressed me right away. We get pitched a lot, and not too
14 many people really understand our industry, but they did.

15 Q And did you have any impression of Mr. Niemann at that
16 time?

17 A I did.

18 Q And what was it?

19 A Smart. Aggressive. Very knowledgeable. Experienced in
20 our industry, representing -- or, involved with CHC, Waypoint,
21 and Erickson.

22 Q So, back then, you didn't retain Houlihan at that point in
23 time, did you?

24 A No, we didn't.

25 Q When was the next time you had a chance to interact with

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1 Houlihan and Mr. Niemann?

2 A It was --

3 MR. LEBLANC: Your Honor?

4 THE WITNESS: It was the following year, at HAI.

5 THE COURT: Hold on a just a second.

6 MR. LEBLANC: Your Honor, this gets back to the
7 motion in limine. I've gone through and I took the
8 opportunity at the lunch break to go back again through the
9 Debtors' motion, and there's nothing that would put us on
10 notice of any Debtor witness intending to testify. There's
11 not -- you -- they can't tie -- and I'm fine with these
12 background questions, but we're already at an area that is
13 well beyond what's in their motion. And if that was the basis
14 upon which Mr. Bospflug could testify today, we're already
15 outside that.

16 And I just worry where we're going now. Because I've read
17 it again. It's as sparse a motion as you can see. It doesn't
18 even mention anything about the board, the company, anything
19 that would be relevant, that would tie to these line -- this
20 line of questioning.

21 THE COURT: Do you want to respond to that?

22 MR. HYNES: It doesn't sound like there's an
23 objection, Your Honor.

24 THE COURT: Do you --

25 MR. HYNES: It sounds like he's threatening to make

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1 an objection.

2 THE COURT: Do you --

3 MR. LEBLANC: I object, Your Honor.

4 THE COURT: Do you want to respond to his comments?

5 MR. HYNES: Yes, Your Honor. The motion was to

6 appoint the investment banking firm by the Debtor. Mr.

7 Bospflug is here on behalf of the company to explain the

8 engagement and the execution of the letter. All we're talking

9 about is background here, Your Honor.

10 THE COURT: Well, okay. I think you ought to move

11 along into the motion, then, all right?

12 MR. HYNES: Okay. Thank you, Your Honor.

13 BY MR. HYNES:

14 Q Could you turn to Exhibit 29, Mr. Bospflug? Do you

15 recognize that document?

16 A Yes, I do.

17 Q And what is it?

18 A Well, it's the -- it's the application to retain Houlihan.

19 Q Okay. And can you look at Exhibit 30 as well?

20 A This is Mr. Niemann's declaration.

21 Q Uh-huh. And does Mr. Niemann's declaration also include a

22 copy of the engagement letter? I'll give you a hint. Look at

23 Page 10 of 40.

24 A Yes, it does.

25 Q Okay. Is that the engagement letter that the company

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1 entered with Houlihan Lokey?

2 A Yes, it is.

3 Q Okay. Were you involved in the negotiation of that
4 letter?

5 A Yes, I was.

6 Q Okay. Can you tell me about the negotiation?

7 MR. LEBLANC: Objection, Your Honor. There's nothing
8 in the motion that talks about any of the negotiation of this.
9 We deposed Mr. Del Genio, the signatory to the motion. We
10 deposed Mr. Niemann, the declarant on the motion. And we
11 didn't -- we got no information about the negotiation of it.
12 Had we known -- and, again, when we were told that Mr.
13 Bospflug would testify, we asked for his deposition. We
14 weren't granted it.

15 THE COURT: Overruled.

16 BY MR. HYNES:

17 Q You can answer the question, or would you like me to
18 repeat it?

19 A Would you repeat it, please?

20 Q Sure. Can -- what do you recall about the negotiation of
21 the engagement letter at issue here today with Houlihan Lokey?

22 A So, it was -- it was really three of us that negotiated
23 this. It was myself, Trudy McConnaughay, our chief financial
24 officer, and Al Gonsoulin, our CEO. And we also had the
25 advice of our local counsel, Jones Walker.

1 Q And did the board ultimately approve this engagement
2 letter?

3 A Yes, they did.

4 Q Do you believe, as you sit here -- well, strike that. Did
5 you hear Mr. Niemann's testimony earlier today?

6 A I did.

7 Q Did you hear the cross-examination that was delivered?

8 A I did.

9 Q Did you hear the statement from Mr. Califano about the
10 discounts Houlihan Lokey is offering?

11 A Yes, I did.

12 Q And as you sit here today, do you believe that the
13 retention of Houlihan Lokey is in the best interests of the
14 company?

15 A Yes, I do.

16 Q Why?

17 A Well, not only were they the most knowledgeable about our
18 industry, but they stepped in at first and did a lot of heavy
19 lifting in terms of financial analysis, presented us with
20 alternatives. Then we moved to the M&A process, and we ran
21 through the complete M&A process. I felt that we had good
22 exposure on that and that we drove it all the way to the end
23 of 2018, looking for a way to monetize part of the company in
24 order to take care of the bonds. It didn't work out. And
25 then we shifted into the restructuring discussions .

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1 MR. HYNES: I'll pass the witness, Your Honor.

2 THE COURT: Mr. Leblanc?

3 MR. LEBLANC: Your Honor, I have no questions.

4 THE COURT: You may step down, sir. Thank you.

5 THE WITNESS: Thank you, Your Honor.

6 (The witness steps down.)

7 THE COURT: Does the Debtor have any more witnesses?

8 MR. HYNES: No further witnesses on this motion, Your
9 Honor.

10 THE COURT: All right. The case switches over to
11 you, Mr. Leblanc.

12 MR. LEBLANC: All right. Yes, Your Honor.

13 MR. HYNES: Sorry. Sorry, Your Honor. Mr. Califano
14 wanted to make sure that I reminded the Court that I reserved
15 some rebuttal time at the end.

16 THE COURT: Yes.

17 MR. HYNES: Thank you, Your Honor.

18 MR. LEBLANC: Your Honor, we have two witnesses, one
19 of which will be by designation. We've talked to the Debtors.
20 And what I propose, Your Honor, it's just a page: Rather than
21 put somebody up there, I'll just read it to the Court.

22 THE COURT: That's fine.

23 MR. LEBLANC: It's literally a page of the --

24 THE COURT: If it's a page, you can just read it into
25 the record.

1 MR. LEBLANC: Yeah. And I'll -- so, and just to
2 gives you a preview of our case, this will be Mr. Del Genio's
3 testimony by double designation, and then my partner, Mr.
4 Stone, will present Martin Lewis to the Court as a --

5 THE COURT: All right.

6 MR. LEBLANC: -- as an expert. And Your Honor, this
7 comes from the deposition of Robert Del Genio taken on April
8 10, 2019. Page 75, Line 14. And I appreciate Your Honor
9 doesn't have it, but I'll just read the question and answer
10 into the record.

11 "Q Do you know who signed the engagement letter for
12 PHI engaging Houlihan?

13 "A No.

14 "Q Was there a -- you did sign the application to
15 employ Houlihan, right? That was filed with the Court.

16 "A As part of the first-day?

17 "Q Yes.

18 "A Yes. I signed. I signed almost everything for
19 the first-day, yes. So I do, I do remember signing
20 that as part of the first-day motions, yes.

21 "Q Did you, as the chief restructuring officer,
22 exercise your business judgment in determining to
23 employ Houlihan postpetition?

24 "A Well, within my scope, I don't have the authority,
25 but I was supportive of their retention.

1 "Q Did you review the terms upon which they were
2 retained?

3 "A I was -- I saw their engagement letter, but that
4 wasn't my responsibility to negotiate the economics of
5 that. That was done with the company and the board.

6 "Q Okay. Did you ever look at the economics that
7 were contained in their engagement letter?

8 "A There's a -- there is lots of permutations, like
9 in every other investment banker's engagement letter.
10 Sometimes I think you need a PhD to figure that out,
11 those out. I was sure -- I was more focused on, to be
12 honest with you, the cash flow forecast and business
13 plan and getting the company ready for Chapter 11."

14 MR. LEBLANC: That ends the designation, Your Honor.

15 THE COURT: Thank you.

16 MR. LEBLANC: And with that, Your Honor, I'll cede
17 the podium to Mr. Stone.

18 THE COURT: And let me ask you. Do you have a hard
19 copy of that, too, that I can have?

20 MR. LEBLANC: I will get you one --

21 THE COURT: You can --

22 MR. LEBLANC: -- that doesn't have notes on it, Your
23 Honor, --

24 THE COURT: That's fine. Yes.

25 MR. LEBLANC: -- in just a moment.

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1 THE COURT: That's fine. Mr. Stone, you may call
2 your witness.

3 MR. STONE: Good afternoon, Your Honor. The
4 Committee calls Martin Lewis.

5 THE COURT: Mr. Lewis? Would you raise your right
6 hand?

7 MARTIN LEWIS, UNSECURED CREDITORS' COMMITTEE'S WITNESS, SWORN

8 THE COURT: You may be seated.

9 DIRECT EXAMINATION

10 BY MR. STONE:

11 Q Mr. Lewis, could you introduce yourself to the Court,
12 please?

13 A Yes. My name is Martin Lewis.

14 Q What do you do for a living?

15 A I have my own company called Gower Advisors, which is an
16 advisory firm that is involved in both restructuring advice
17 and investment -- analyzing investment opportunities.

18 Q Would you tell the Court about your educational
19 background?

20 A Yes. I have a master's degree from Oxford University in
21 the United Kingdom and I trained and qualified as a chartered
22 accountant in the U.K. with Coopers & Lybrand .

23 Q And if you could step through your employment history
24 after becoming a chartered accountant.

25 A My first banking role was at the Rothschild Bank in

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1 London, and then I came to the United States in 1986 with
2 Chemical Bank, primarily involved in capital markets and
3 financing activities. I joined Chemical Bank's restructuring
4 and reorganization business under a gentleman called Art
5 Newman in 1989. We moved as a group to Blackstone in 1991,
6 and we were the founding members of Blackstone's restructuring
7 business in 1991. I was a managing director there, and then I
8 became a partner at Wasserstein Perella in their
9 restructuring/investment banking business in 1998. And I was
10 a founding member, a founding partner of the firm that spun
11 out of Wasserstein Perella that was called then Miller
12 Buckfire Lewis, which is now known as Miller Buckfire. And
13 through that time, my primary activity was as an investment
14 banker managing and running large complex bankruptcy cases and
15 out-of-court cases.

16 I then spent some time in 2004, '5, and '6 working with a
17 private equity firm in an attempt to set up a merchant banking
18 business, which didn't work out. Then I came back into the
19 restructuring advisory business in 2007 when I became a
20 managing director of Greenhill in New York, and I spent seven
21 years with them as a managing director, again, involved
22 primarily in investment banking advisory business for mostly
23 companies.

24 And since 2013, when I left Greenhill, I have had my own
25 firm, Gower, in which I split my time between assisting a

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1 family fund in New York looking for investment opportunities
2 in the middle market and providing advice in the restructuring
3 world, slightly different from the type I used to do in
4 investment banking but more strategic, high-level advisory
5 business.

6 Q Now, through the course of your career, starting when you
7 were at Chemical Bank, did you have occasion to be involved in
8 the negotiation of engagement letters for your firm as an
9 investment banker?

10 A Yes, I did.

11 Q Tell me about that. What is your experience in
12 negotiating engagement letters?

13 A Pretty much in every case since I became a senior member
14 of teams, which would have been in Blackstone in the mid-'90s,
15 from that point my role is primarily running cases, advisory
16 cases, and I would have been the person responsible for
17 negotiating those engagement letters on behalf of the company
18 I was working for. And so I was intimately involved in the
19 engagement letter process throughout the whole of my career
20 when I was with large investment banks.

21 Q And when is the last time that you can recall being
22 involved in the negotiation of an engagement letter?

23 A So, the last -- specifically, the last engagement letter I
24 was involved with for a company that was -- for the company
25 side involved in a restructuring was for NCI in 2010.

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1 Q Okay. And have you negotiated any engagement letters
2 since then?

3 A I have negotiated various engagement letters connected
4 with restructurings for myself as -- on behalf of creditors
5 and other potential interested parties. I have not negotiated
6 a debtor-side engagement letter --

7 Q And --

8 A -- since then.

9 Q -- what other things, if any, have you done to stay
10 abreast of the market for fees for investment bankers in the
11 restructuring area?

12 A I was involved in, this last December and January, in a
13 situation where I was asked to review a set of engagement
14 letters for debtor advisors in a case called *David's Bridal* in
15 Delaware on behalf of a lender group. And in that process, I
16 provided something similar in the declaration and analysis I
17 did here, which was a review of about 25 debtor-side cases,
18 2017 and 2018, a review of all the aspects of those engagement
19 letters, with the same analysis, which was to understand
20 whether they appeared -- whether the objection that was being
21 raised about somebody's engagement letter was reasonable in
22 light of the market of engagement letters.

23 Q In the *David's Bridal* matter, did you end up testifying?

24 A I didn't actually get up on the stand in the end. It was
25 settled in the courtroom minutes before I was asked to the

1 stand.

2 Q Okay. Did you ever, on any other occasion, testify about
3 investment banker fees?

4 A I did testify once in a case called *Fleetwood Industries*,
5 in which I was the investment banker, where there was an
6 objection to our fees in that case. That was in California.
7 And I testified on the reasonableness of our fee, engagement
8 letter, then.

9 Q Okay.

10 A That was 2009.

11 Q So, in either of the *David's Bridal* case and the *Fleetwood*
12 case, were you formally offered as an expert on fees?

13 A I am not sure of the answer to that. I know I gave
14 testimony in *Fleetwood* on the stand. My recollection was that
15 I thought I might have been accepted as an expert, but it
16 might have been just as a -- as a witness for my engagement
17 letter. And again, on *David's Bridal*, I had thought I might
18 -- I was going to be put on the stand as an expert on those
19 things, and then I didn't get up on the stand in the end. And
20 so I don't know really the answer technically to that
21 question.

22 Q Okay. What were you asked to do in this matter?

23 A I was asked to do a similar review of reviewing the
24 Houlihan engagement and give an opinion as to whether I
25 thought that the overall terms of that engagement were

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1 reasonable in light of the size and complexity of the case
2 involved.

3 Q And what did you do to come to that opinion?

4 A I -- as I mentioned, I had already prepared an analysis
5 for the *David's Bridal* case that had a number of company
6 cases, about 20 of them, and I was provided with a schedule
7 that had been developed by Houlihan Lokey that I think was
8 presented earlier that reflected cases in 2015 and 2016. And
9 so I took all of those cases and I took the cases I had
10 reviewed in '17 and '18 and I reviewed all the details of the
11 engagement letter, from the actual engagement letter through
12 the application, the final order, and then the final fee
13 applications for all those engagement letters.

14 Q Okay. Did you add or subtract any companies from the list
15 of comparables that you received from the Houlihan document
16 that you saw?

17 A Yes, I did.

18 Q What did you do?

19 A Well, there -- as I said, I had prepared something for
20 this other situation which included some companies in the \$400
21 to \$800 million debt range that weren't on the Houlihan list,
22 and I had about six of them, I think, that were -- that fit
23 the same parameters, which was companies that filed in 2017
24 and 2018 that had prepetition debt somewhere in the \$300 to
25 \$800 million range. So I added the ones that I had that

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1 weren't on the Houlihan schedule, I added those to our
2 schedule.

3 Q And did you take any off?

4 A I took the one off that was unidentified, I think it was
5 called Unidentified Company, because I couldn't verify what it
6 was. It had no indication of what the company was. It wasn't
7 public. And I -- there was a duplication of one of the
8 entries. And then I made some adjustments to some of the
9 entries on the debt side in particular that was on the
10 Houlihan schedule, just to make sure that all the numbers were
11 consistently treated.

12 MR. STONE: Your Honor, at this time I would like to
13 offer Mr. Lewis as an expert in financial advisor's fees in
14 restructuring matters.

15 MR. CALIFANO: Your Honor, I object. I don't see how
16 this witness has anything -- any specialized knowledge that
17 fits within Rule 702. There's -- all he's said is that he's
18 gotten publicly-available documents and ran them through some
19 sort of grid. 702 says clearly an expert qualified by
20 knowledge, skill, experience, training, or education, and I
21 don't see how any of that relates to professional fees.

22 THE COURT: That objection --

23 MR. CALIFANO: May I *voir dire*?

24 THE COURT: That objection is overruled. Goes to the
25 weight to give the witness' testimony. He may testify as an

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1 expert.

2 MR. STONE: Thank you, Your Honor.

3 BY MR. STONE:

4 Q Mr. Lewis, if you would turn to Debtors' Exhibit 33, which
5 is in one of those big notebooks behind you.

6 A Oh. Is it Volume I or Volume --

7 Q Should be Volume I, I think.

8 A Volume I? I'm sorry. Say again. Thirty -- what number?

9 Q Thirty-three.

10 A Thirty-three? Yes, I have it.

11 Q Do you recognize that document?

12 A Yes, I do.

13 Q And what is that document?

14 A This is my declaration, including the analysis that I
15 developed in support of the objection.

16 Q Okay. And is that your signature on Page 11? Did you
17 execute the document?

18 A Just check that it was. Yes. Yes, I did.

19 Q And do you continue to believe that everything in this
20 declaration is true?

21 A Yes, I do.

22 Q Okay. Could you describe for the Court generally how
23 investment bankers are compensated in restructuring matters?

24 A Yeah. It's been a pretty standard arrangement for
25 investment bankers since probably the mid-'90s, I think, of

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1 the engagement letter being a combination of a monthly fee
2 that might change in different ways, but it's usually a fixed
3 monthly fee.

4 There's usually a restructuring or transaction fee at the
5 completion of the case. There is usually a sale fee if either
6 the company is sold in full or if there are assets of the
7 company sold in 363 sales. There are usually a set of
8 financing fees that relate to raising money. And they're --
9 and those are usually identified as percentage fees relating
10 to different types of financings.

11 There is usually a monthly credit involved, at least in
12 the monthly -- the monthly fees set off against the
13 restructuring fee, and that can take the form of a number of
14 different ways of doing it. There is very frequently a
15 crediting of some of the financing fees against restructuring
16 fees.

17 There's usually -- it's pretty normal to have, as I think
18 Mr. Niemann has testified, the sale or the restructuring fee
19 being either one or the other. Usually banks don't take both
20 a transaction fee and a sale fee if it's for the whole
21 company.

22 There's often involved in these terms reduced fees if the
23 money in the financing section is provided by creditors
24 already involved in the case.

25 And then, in the technical side, there's always been --

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1 328 has always been a part of the engagement letters that
2 certainly I have experienced over my time as an investment
3 banker, that's a normal part of the request, as is the
4 indemnification request that is always part of the -- always
5 part of the engagement.

6 Q Please turn to Exhibit A in your declaration.

7 A Yeah. I have it.

8 Q And you were in the courtroom this morning when Mr.
9 Niemann was testifying?

10 A Yes, I was.

11 Q And so there was some -- some discussion of this document.
12 But can you describe generally what you did in this particular
13 document?

14 A Excuse me. Yes. This was meant to try to quantify what
15 we thought could be the overall quantum of fees that were
16 possible to be earned under the engagement letter, given that
17 there were no caps and credits involved in the letter.

18 We tried to look at what the total fees that Houlihan
19 could earn from the beginning of their engagement through to
20 completion of a transaction, of confirmation of a plan. Given
21 that there was a premium for getting the plan confirmed within
22 180 days of the filing, we prepared two potential scenarios.
23 One was a filing just prior to that, so that they would earn
24 their premium, and one was an assumption of a confirmation I
25 think three months later, at the end, in December, so that

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1 that could be an example of what they might earn without the
2 premium but with the additional monthly fees.

3 Q Okay. Now, you heard the representations made to the
4 Court this morning about a 30 percent discount to the
5 financing fees. Do you recall that?

6 A Yes, I do.

7 Q Have you had a chance to figure out what the effect of
8 that 30 percent discount would be on this particular exhibit?

9 A I've just had an opportunity to do a back-of-the-envelope
10 calculation of what that would look like, yes.

11 Q And what is your back-of-the-envelope calculation?

12 A Well, if -- nothing changes in the first four lines,
13 obviously. If the financing fee of -- on the ABL would be at
14 70 percent, that I think would be 2.4. I understand from
15 Houlihan that they are agreeing not to take any fee at all on
16 any Blue Torch exit facility. This was done purely in the
17 four corners of the reading of the engagement letter. There
18 was no clear statement in the engagement letter that that fee
19 couldn't be earned. And the disclosure statement had a clear
20 object of potentially a revised Blue Torch exit facility, and
21 it wasn't clear that that might or might not be charged.

22 So, obviously, on the representations of Mr. Niemann, that
23 would come out in its entirety.

24 And then the \$4.2 million, I've heard this morning that
25 there may or may not be a rights issue involved. If there

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1 isn't, then obviously that fee doesn't come. If there is a
2 rights issue of some nature, I've heard Mr. Niemann I think
3 say he would get whatever 70 percent of six percent would be
4 from whatever source of financing that rights issue came from.

5 So I don't have it -- and the monthly credit would be the
6 same, I think. So, I think I calculated that the -- if there
7 was no rights issue and no Blue Torch, I think the total
8 quantum of fees in this middle column would be somewhere in
9 the \$11 million range. I believe that's how I calculated it.

10 Q Okay. The number at the bottom, as percentage of
11 prepetition debt, says \$630 million. How did you come to that
12 number?

13 A The \$630 million was the -- was taken from the first-day
14 declarations of the company. It's the \$130 million of Thirty
15 Two revolving credit and the \$500 million of senior notes.

16 Q You were in the courtroom this morning when there was some
17 discussion on Mr. Niemann's cross-examination about the
18 inclusion of operating leases. Do you recall that?

19 A Yes, I do.

20 Q Why did you not include the operating lease payments in
21 the prepetition debt?

22 A For two reasons. One is that there was -- there's no
23 disclosure of any capital leases involved in this company.
24 All these leases are operating leases. So, in the first-day
25 declarations, though, there's no quantification at all of the

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1 obligations of the leases. There's certainly nothing in the
2 disclosure statement. They are noted as a footnote in the
3 10-K of the company, which is a review of cash obligations
4 going forward. But it's not on the balance sheet of the
5 company and it's not capital leases. So, on that basis, we
6 didn't have any indication of whether there was a capital
7 obligation to include in debt.

8 And then, second -- and to the extent that it's an
9 operating lease, the 45 companies that we had as comparables,
10 many of those companies would have similar situations where
11 they would have operating leases. And the analysis was done
12 purely on prepetition debt. And there's a number of retail
13 companies where the negotiation of leases, for example, would
14 be a very fundamental part of the activities of the investment
15 banker.

16 But in no case have I ever seen an analysis where
17 operating leases are capitalized onto this type of analysis to
18 be included in debt. I've just never seen it done.

19 Q Okay. Why don't you flip over one page, to Exhibit B?
20 Could you describe generally for the Court what Exhibit B is?

21 A Yes. B is a summary of what I regard as the salient
22 features of every engagement letter that we reviewed. They
23 start from the company and the jurisdiction it was filed in,
24 the date it was filed, the banker involved. And then it goes
25 through the columns of -- of Funded Debt are the prepetition

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1 funded debt done on a consistent basis for every company, so
2 it's adjusted to, for example, exclude unpaid interest at the
3 filing date. It includes letters of credit that are
4 outstanding.

5 Sometimes, in first-day declarations, you can get a number
6 of different ways of reflecting those numbers, so these are
7 all calculated on the same apples-to-apples basis.

8 Then there's a monthly fee, indication of what the monthly
9 fee is and an indication of both the amount of monthly that is
10 credited and the number of months after which that crediting
11 takes place. And then there's something we shortly call the
12 RX Fee, which saved me from rewriting Restructuring Fee a
13 hundred times. But that's the transactional completion fee in
14 dollars, and then the next column is the restructuring fee
15 quantified as a percentage of the prepetition debt.

16 And then we take from the engagement letters just the
17 straight percentages of fees on the financings for both DIP,
18 if it's separated, if it's shown separately in the engagement
19 letter, or secured debt, unsecured debt, and equity.

20 And then, finally, on the right-hand side, there are four
21 columns which are more qualitative, which is to say where in
22 the engagement -- do these engagement letters have any element
23 of limitation of the overall quantum of those fees through the
24 mechanisms such as either lower fees paid to existing
25 creditors who provided the financing, a specific credit that

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1 might have taken place, such as a percentage of the financing
2 fees offset against a restructuring fee? In many of them,
3 there was a cap, which served to limit the overall quantum of
4 the fee.

5 And the final column was that there were several cases
6 where there were voluntary reductions made by the investment
7 banker at the end, following, I think, objections to their
8 fees.

9 Q So, for example, this column that says Lower Fee/Exclusion
10 for Existing Lenders, this shows that the vast majority of the
11 companies that you looked at had some kind of a credit?

12 A Yes. I think it's fair to say it's a very normal part of
13 engagement letters that if the funding is provided by -- and
14 this could be debt -- this could be DIP finding, a rights
15 issue, it doesn't necessarily mean equity, but it could be any
16 type of funding. It's very frequent that if that's provided
17 by the existing creditor group, then the fees are either lower
18 or forgiven.

19 Q Okay. Let's step through a few of these numbers at the
20 bottom. What did your analysis show about the proposed
21 monthly fees to be charged by Houlihan?

22 A So, we -- we have a median, average, high, and low, just
23 to show the range of data points. The median being,
24 obviously, 50 percent above, 50 percent below. Median and
25 average come out pretty close.

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1 But this one told you that the highest monthly we had in
2 this data point was \$175,000 a month. The lowest was \$50,000.
3 On average, it was about \$150,000 a month on -- on the average
4 debt of about \$546 million.

5 Q What did your analysis show with respect to the
6 restructuring fee?

7 A So, the restructuring fee came out, on average, about .78
8 percent of prepetition debt, with a low of .3 percent and a
9 high of 1.02 percent.

10 Q Okay. And how does that compare to what Houlihan was
11 proposing to charge?

12 A So, the Houlihan fee is below, based on the \$630 million,
13 obviously, of denominator, Houlihan's fee just on the
14 restructuring fee is 1.1 percent of the prepetition debt.

15 Q All right.

16 A Assuming the \$6.9 million, which is the -- with the
17 premium.

18 Q And what did your analysis show with respect to the
19 financing fees that were proposed by Houlihan before today?

20 A So, I made the observation that Houlihan's fees of two
21 percent for debt, three percent for unsecured, and six percent
22 for equity were basically on the high side of the range of any
23 of these data points that we see. So, in particular, the
24 equity of six points, that's the highest. And I'm not even
25 sure -- there is one, sorry, two data points in which there

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1 was a six percent fee. So my observation was that their range
2 of financing fees were all at the high end of the comparable
3 range.

4 Q If you'll look at Exhibit C. What is this exhibit?

5 A This was a -- we call it a scattergraph, which just puts
6 the data points on a graphic basis. I think it helps to
7 identify where you might believe the market is for the general
8 number of cases involved.

9 This has, as the horizontal axis, this is the size of
10 prepetition debt, between \$200 million and a billion. And the
11 vertical axis is the percentage of the restructuring fee as a
12 percentage of prepetition debt. And it lays out all the data
13 points on the Exhibit B beforehand, and I think it shows the
14 clustering of a large number of cases somewhere certainly
15 below one percent, but it shows a large clustering around the
16 average of .78 percent.

17 Q Great. And this one is limited to the restructuring fee;
18 is that right?

19 A This is just the restructuring fee as a percentage of
20 debt, yes.

21 Q All right. Okay. Turn over to Exhibit D. What is
22 Exhibit D?

23 A So, Exhibit D is all the same cases, but in this case we
24 looked at -- for most of them, they were transactions that had
25 been completed, so we looked at what the bank -- what the

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1 banker had actually earned from the beginning of his
2 assignment, usually from the engagement letter that related to
3 the restructuring. That might have been prepetition, usually
4 was prepetition. And this was meant to identify all the fees
5 that the banker earned: the monthly fee, the restructuring
6 fee, or a sale fee, the financing fees. And then it reflected
7 the credits that were received or applied to those fees or the
8 cap that was provided.

9 So that at the right-hand side, there was a Total Fee
10 column, which is the column before the last column, which was
11 the total quantum of fees that were earned by the banker for
12 that restructuring. And the final column was the percentage
13 of that fee as expressed as a percentage of prepetition debt.

14 Q So what documents did you rely on to get the data for
15 Exhibit D?

16 A For both exhibits, we relied primarily on the first-day
17 declarations in order to establish the debt that was -- that
18 should be included. We looked at the application made by the
19 banker for employment. We looked at the final order, since a
20 number of the orders did change the terms under which the
21 engagement was to be approved. And then we looked at the
22 final fee applications, which pretty much invariably laid out
23 pretty clearly all the fees that the banker had earned, both
24 prepetition and postpetition. So those were the documents.
25 And we, in some cases, we did refer to the disclosure

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1 statement, just to prove up the debt numbers.

2 Q And what did you conclude about the all-in fees proposed
3 by Houlihan before today as it compares to the data that you
4 collected?

5 A Well, this chart, on the bottom right, you can see the
6 average of the total fees. The median is 1.02 percent of
7 total fees to debt. The average is 1.1 percent of the total
8 fees to debt. The highest number, and it was only one -- I
9 think one item that was high, it was two percent of total fees
10 to debt, and the lowest was .52 percent.

11 But this directed me to regard a reasonable level of fees
12 as being somewhere in the 1.1 percent of total debt range.
13 That would be the average of the data points of the 45 cases
14 that we looked at.

15 And if you look at the PHI -- the Houlihan case,
16 obviously, based on the earlier analysis, which included a
17 number of fees that I understand will be adjusted, but on that
18 basis this was almost three percent of -- 2.9 percent, and no
19 cap that might have limited any change to the plan if
20 something else changed from the plan.

21 Q And then what is Exhibit E?

22 A And Exhibit E is just the same scattergraph showing those
23 data points, those all-in costs as a percentage of prepetition
24 debt, compared, again, to the -- the same axes as in the first
25 graph. And this, again, was just to show the predominance of

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1 deals in the -- around the average, and it showed how far off
2 market the Houlihan all-in fee was, if they were going to earn
3 all the fees that were potentially possible under that
4 engagement letter.

5 Q Now, you heard Mr. Niemann testify this morning about the
6 -- what he calls a pace premium. I think we called it a speed
7 premium.

8 A Yes.

9 Q Have you seen that kind of premium before?

10 A I have not -- I have not seen it as a typical element of
11 engagement letters.

12 Q And did you look with respect to the 45 comparables that
13 are on your Exhibits B and D to see whether they had so-called
14 pace premiums?

15 A It didn't -- yes, I did look. It hadn't immediately --
16 there were none on this list, as I was aware. I did go back.
17 I heard Mr. Niemann say this morning that *UCI* had a pace
18 premium to it, and so I actually went back and reviewed the
19 engagement letter in that. In that engagement letter,
20 actually, the premium was simply a \$500,000 additional fee for
21 a prepackaged arrangement. It didn't -- it wasn't a premium
22 related to the time in which a case was completed. It was
23 just a premium for doing a prepackaged, which would have had
24 the agreement of all the creditors and thereby would have
25 limited the time spent in bankruptcy, which that is a normal

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1 -- it's not abnormal for banks to be motivated to try to do a
2 prepackaged or pre-arranged deal to limit the amount of time.
3 But that's normally done in the form of a -- maybe a slightly
4 higher transaction fee. But the idea of a pace premium is not
5 anywhere in any of these examples that we looked at.

6 Q Okay.

7 MR. STONE: I'll pass the witness.

8 THE COURT: Thank you. Mr. Califano?

9 MR. CALIFANO: Your Honor, if we could just take a
10 five-minute break?

11 THE COURT: Sure.

12 MR. CALIFANO: Thank you.

13 THE COURT: We'll take five minutes.

14 THE CLERK: All rise.

15 THE WITNESS: May I step down?

16 THE COURT: You may step down. During your
17 testimony, don't -- excuse me. During the break, don't speak
18 with anyone about your testimony.

19 THE WITNESS: Yes, sir.

20 (A recess ensued from 2:17 p.m. until 2:23 p.m.)

21 THE CLERK: All rise.

22 THE COURT: Good afternoon. Please be seated. Thank
23 you very much.

24 Mr. Califano?

25 MR. CALIFANO: Yes, Your Honor. Thank you. I'll be

1 right there.

2 CROSS-EXAMINATION

3 BY MR. CALIFANO:

4 Q Good afternoon, Mr. Lewis.

5 A Good afternoon.

6 Q Now, how did you come to be hired by the Creditors'

7 Committee to opine on the Houlihan fee?

8 A I was approached by Oaktree initially, who I had done some
9 work for, as I mentioned, on another case. And we had been
10 successful in that case. And so Oaktree had this situation
11 and called me up and asked me if I was willing to provide
12 testimony on this one.

13 Q And who called you from Oaktree?

14 A Initially, Grant Nachman e-mailed me, and then a gentleman
15 called Mahesh Balakrishnan, I think is his name, called me.

16 Q Did you produce that e-mail? Was that e-mail produced?

17 A Yes, I did.

18 Q Okay. Now, when you spoke to Oaktree, what did they tell
19 you about the Houlihan fee?

20 A They outlined a little bit of their views of what the fee
21 -- what they thought the quantum of the fee was. I think it's
22 in the -- it's in the e-mail that they sent.

23 Q I can look at your deposition. Now, you were deposed by
24 my partner, Mr. Hynes, correct?

25 A Yes.

1 Q On April 24th?

2 A Yes, sir.

3 Q And he asked you the same question I asked you, "What did
4 he tell you about the Houlihan fee?" And this was your
5 answer. "He told me what was in the application and told me
6 that Oaktree thought it was too high."

7 A Yes.

8 Q "That was it." So, before you were retained, you knew
9 that your putative client had formed an opinion about where
10 -- where you should come out, correct?

11 A Well, he asked me, he -- he gave that information and he
12 asked me if I would review --

13 Q Well, he told you, he said it was too high, correct?

14 A Yes.

15 Q Okay.

16 A Yeah.

17 Q So you were told by the person who was going to hire you
18 on behalf of the Committee that he believed it was too high,
19 --

20 A Yeah.

21 Q -- correct?

22 A Yes. Correct.

23 Q So did that indicate to you at all where your opinion
24 should come out?

25 A He asked me to review the application and --

1 Q That's --

2 A -- asked if I --

3 Q That's not my question.

4 A May I answer --

5 MR. STONE: Your Honor, if he could allow him to
6 finish his answer, I'd appreciate it.

7 MR. CALIFANO: But it's non -- I'm --

8 THE COURT: Well, then you need to say nonresponsive
9 so I can rule on that.

10 MR. CALIFANO: Okay. Thank you.

11 THE COURT: I sustain on nonresponsive.

12 THE WITNESS: I'm sorry. Can you ask the question
13 again?

14 BY MR. CALIFANO:

15 Q The question was -- I forgot what the question was now.
16 What was the question?

17 THE COURT: I'm afraid our system doesn't work like
18 that, Mr. Califano. You'll have to go back and --

19 MR. CALIFANO: No. We'll just go through it again.

20 THE COURT: Yeah.

21 BY MR. CALIFANO:

22 Q So, Oaktree -- and this is from your deposition testimony.
23 We can read it again if we have to. But they complained to
24 you that there was no crediting mechanism, correct?

25 A I'm not sure. They just --

1 Q Well, I can just go to your deposi...

2 A They said that it was a high level of fees. And I don't
3 recall if they specifically said there was no credit.

4 Q Okay.

5 A But they were concerned with the total quantum of fees,
6 yes.

7 Q Is it -- this is a question that Mr. Hynes asked you on
8 April 24th. "Is it fair to say that Oaktree was the first one
9 to complain that the Houlihan fee application had no crediting
10 mechanisms?" And your answer was yes.

11 A Okay. Yes.

12 Q Okay. So that didn't influence the way you came out on
13 your opinion at all?

14 A As I was about to say, I was asked to review the motion
15 and then asked if I would give the opinion based on my review
16 of Houlihan's fee letter, which I did independently of
17 Oaktree's comments.

18 If I had thought it wasn't a reasonable thing to provide
19 testimony, I wouldn't have done it. So I understood where
20 Oaktree was coming from, but that didn't -- that didn't bias
21 my response. I looked at the motion and the application; then
22 I took my own decision as to whether I thought it was a high
23 fee and therefore whether I would accept the assignment.

24 Q Okay. So the fact that the person who contacted you to
25 come into this case told you that it was too high and pointed

1 to the crediting mechanism, that had no bearing on what you
2 did?

3 A No, it had no bearing on my decision to accept the
4 assignment and --

5 Q It --

6 A -- and then the work that I did.

7 MR. CALIFANO: Move to --

8 BY MR. CALIFANO:

9 Q It had no bearing on the work you did? So, what would you
10 have done if you did your analysis and said, you know what,
11 this comes right within what I think is reasonable?

12 A If I had -- I wouldn't have accepted the assignment to
13 begin with. I would have looked at it -- I wouldn't have
14 accepted the assignment if I had thought there was not --
15 because we had just finished on *David's Bridal* something very
16 similar and had concluded a similar issue.

17 Q Okay. So let's just step -- what -- so, what analysis did
18 you do before you accepted the assignment? Because you said
19 if you didn't agree you wouldn't have accepted the assignment.
20 So what did you do?

21 A Well, I had already completed -- the assignment that we
22 did for *David's Bridal* had pretty much all these companies --
23 all the companies for 2017 and '18, I had already analyzed for
24 a prior case. And so I was fully -- I was fully aware of the
25 comparables that we used in the *David's Bridal* case.

1 So when I looked at the Houlihan situation and I took a
2 shot at trying to understand the quantum of their fees myself,
3 and on the basis of what I had understood in *David's Bridal*, I
4 had concluded that I was likely -- it was likely to be that
5 those fees were going to be high, I was going to find that
6 they would be high, and therefore that's why I accepted the
7 case.

8 Q Is this -- so, what was your role in *David's Bridal*?

9 A I'm sorry?

10 Q What was your role in *David's Bridal*?

11 A I worked for the lender group in the objection to
12 Evercore's fees in that case in Delaware.

13 Q Okay. And is there any difference between this case and
14 *David's Bridal*?

15 A Generally, no. It was about an 800 -- it was a slightly
16 larger case, about \$800 million of debt. And the fee there
17 for Evercore was about \$13 million, and it was reduced to \$10
18 million on the settlement.

19 Q Now, you said the last time you were involved as a debtor
20 professional was in 2010 and the last time you testified on
21 behalf of an engagement was in 2009, correct?

22 A Yes.

23 Q Okay. Have things changed at all since 2009?

24 A As I mentioned earlier, the structure of engagement
25 letters hasn't changed at all, but the economics of them

1 obviously change over time based on the competitive
2 environment of investment banking. But, so the fee levels
3 change over time, and because I had reviewed 25 of those in
4 2017 and '18, I had a pretty good sense of where the current
5 market was for the general level of fees on these types of
6 engagements.

7 Q But how --

8 MR. CALIFANO: See, it's difficult because I don't
9 want to interrupt the witness, but he keeps pausing, so it's
10 tough for me, Your Honor.

11 BY MR. CALIFANO:

12 Q But, overall, have fees gone up or down since 2009?

13 A I think fees have actually gone down since 2009.

14 Q Really?

15 A I was surprised, actually, at the level. When I look at
16 these overall fees, I was surprised at how many of them came
17 in within the \$3 to \$5 million range for companies of this
18 size.

19 Q And --

20 A And I thought that was -- in general, my experience and
21 memory was that fees were somewhat higher in those days.

22 Q Really? So the only thing that hasn't been affected by
23 inflation is investment banker fees?

24 A It's a competitive environment and people -- there are
25 quite a large number of investment banks out there competing

1 for the same business, so --

2 Q And there wasn't any competition in 2009?

3 A Less.

4 Q Okay. Now, so in the *Fleetwood* case, do you remember what
5 the monthly fee was that you were seeking to have the Court
6 approve --

7 A Yes, I do.

8 Q -- in 2009?

9 A Yeah.

10 Q And what was that?

11 A So, the package was an initial retainer fee of a million
12 dollars prepetition, no monthly fee for the first two months,
13 \$200,000 for the next -- for after the first two months, with
14 crediting --

15 Q So \$200,000 wasn't too high in 2009, but it's too high
16 now?

17 A The case in *Fleetwood* was a very unusual case.

18 QA That's --

19 A May I --

20 Q I didn't ask you for the difference. But in 2009 -- in
21 2009, \$200,000 a month was fine, but now you're saying
22 \$200,000 a month by Houlihan is too much?

23 A I'm saying the \$200,000 in the case of *Fleetwood* was a
24 structured fee because it was extremely -- it was extremely
25 timely and we didn't think we would earn -- and it was

1 potentially going to liquidation and we didn't think we would
2 earn any of the final fee. We weren't sure of that. So we
3 had a higher monthly, I agree that it was a high monthly, but
4 that was structured because we weren't sure whether we would
5 even get the transaction fee or the sale fee, because it could
6 have gone to liquidation.

7 Q Well, actually, the first two months are at \$500,000 a
8 month, right? Because you got a million for up to the first
9 two months?

10 A Prepetition, there was another two months.

11 Q Right. But those are --

12 A So the million --

13 Q -- for the two months?

14 A -- covered four months, I think. The million was at least
15 a month and a half prepetition.

16 Q All right. So then if -- so then it was three and a half?

17 A Yes. It was --

18 Q What's it, three and a half, four? It's still --

19 A Yeah. We were looking --

20 Q It's still more than \$200,000 a month, and then it dropped
21 to \$200,000 a month?

22 A We were looking to be sure that we were compensated for a
23 significant amount of work on both DIP, M&A, and potential
24 plan, in a case where we might have not got past three or four
25 months and we might have not got anything else.

1 Q Well, --

2 A So, yes, we -- we frontloaded it to ensure that we had
3 good compensation in case it didn't go to a final plan.

4 Q So is it your expert testimony that it is appropriate to
5 charge higher fees if you don't know where the case is going?
6 Is that what you're saying?

7 A No. I'm saying that in the specific case of *Fleetwood* it
8 was a -- it was at the bottom of the financial recession. It
9 was extremely hard to find financing. And our judgment at
10 that time was that we weren't sure whether we were going to
11 make any money on the case. And so we requested a fee
12 structure that was compensating us for a very intensive
13 process which we felt would have been fair in a case where it
14 might have ended up in liquidation. We would have made a
15 million dollars or something out of it.

16 Q All right. Let's -- we'll talk about comparing that case
17 to this case in a second, but do you recall what the unsecured
18 financing fee was in that case to your firm?

19 A Yes. I believe it was two --

20 Q And what was it?

21 A I believe it was two percent, yes.

22 Q And two percent is -- you've said is too high for Houlihan
23 in this case?

24 A I said that based on the comparables we had for the
25 current market, two percent was at the high side of the range,

1 yes.

2 Q And what was the fee for unsecured?

3 A In--?

4 Q In your case.

5 A *Fleetwood*?

6 Q *Fleetwood*. Your last case.

7 A I actually don't recall.

8 Q It was five percent.

9 A Five?

10 Q Would that shock you?

11 A No, I think it was three --

12 Q Oh, I'm sorry.

13 A It was three percent, and five percent for equity, yeah, I
14 think.

15 Q Right. And what are the fees for Houlihan?

16 A They're six percent for equity and four percent for
17 unsecured.

18 Q Didn't they reduce them, though, today by 30 percent?

19 A My analysis -- yes.

20 Q Okay. So, with the reduction -- and by the way, do you
21 think the fees are reasonable now that they've been reduced?

22 A I would -- so, I -- I think the issue that we have is that
23 -- that I have is --

24 Q And --

25 A -- that I don't think it's reasonable. On the -- on the

1 proposal that has been made, my opinion would be that the
2 normal crediting of financing fees is higher than 30 percent,
3 when it's provided.

4 Q Provided by whom?

5 A The normal fees --

6 Q Provided by whom?

7 A Provided by existing creditors.

8 Q Okay.

9 A That when you have a rights issue provided by noteholders,
10 in the cases that we presented, I think about five of those
11 cases had rights issues, and the fees were well below two
12 percent. So a 30 percent credit on six percent would still be
13 -- would still result in a very high fee for a rights issue
14 provided by existing creditors.

15 Q But that's out of the plan, right? It's out of the plan
16 now, the rights offering?

17 A Yes. But my point would be if that -- if the engagement
18 letter comes and says that Houlihan will not get any fee for
19 any sort of rights issue whatsoever, that would be fine, but
20 they're not saying that.

21 Q That'd be fine?

22 A They're not -- if there was a cap or a credit that said
23 Houlihan agrees that under no circumstances would they earn a
24 fee for a rights issue provided by existing creditors, that
25 would be a factor.

1 Q And is that, you believe, market, that there should be no
2 fee for existing creditors?

3 A The market, the five cases that we had in our comparable,
4 all five of them have a fee that's below two percent, so --

5 Q Okay. And how many cases involved rights offerings in the
6 last --

7 A Well, --

8 Q Since you -- in 2009, how many -- how many cases had
9 rights offerings since 2009?

10 A I couldn't -- I couldn't put a number on it.

11 Q So do you think it's fair to pull five out?

12 A I'm saying that -- no.

13 Q You pulled out five. You said you had five in your
14 sample.

15 A I said that in the 45 of all the cases between \$400
16 million and \$800 million, there was specifically five cases in
17 which rights issues were done with money provided by existing
18 creditors. Many of the cases that we looked at had reduced
19 fees. I'm just pointing to the ones that actually had a
20 rights issue that was implemented with noteholder money. But
21 --

22 Q Let me ask you a question. When you were comparing the
23 fees in your charts here, right, --

24 A Yeah.

25 Q -- did you compare -- you said you compared the Houlihan

1 potential fees to the actual fees granted by the courts,
2 correct?

3 A Yes.

4 Q All right. Now, isn't it true that in almost every
5 investment banking letter there's a number of fees, not all of
6 which apply? And we've heard Mr. Niemann testify before that
7 he clarified, if a transaction has more than one potential
8 fee, he's only going to seek one. How would your charts
9 change if you compared apples-to-apples? That is, if you
10 compared potential fees to the potential fees that each one of
11 these bankers could get?

12 A Well, first of all, I'd have to go back and compare each
13 plan.

14 Q So you didn't do it? You didn't do it?

15 A We didn't, because the --

16 Q That's all I need. All I need is that you did not do it.
17 Thank you. Can we turn back to Exhibit A?

18 THE COURT: And we're in 33; is that right?

19 MR. CALIFANO: Yes. I'm sorry. Exhibit A to his
20 declaration, Your Honor.

21 THE COURT: Uh-huh.

22 BY MR. CALIFANO:

23 Q Okay. So that's the calculation of potential fees.

24 A Yes.

25 Q And you have a total number of prepetition debt, right, of

1 \$630 million?

2 A Yes.

3 Q Now, that number carries through every other chart,
4 correct?

5 A Correct.

6 Q So if that number is wrong, then every other chart has to
7 be adjusted, correct?

8 A I'm sorry. In terms of the chart, Exhibit B?

9 Q Well, all your -- what do you call these? The bunching
10 together? What do you call those charts?

11 A The scattergraphs?

12 Q The scattergraphs. The scattergraphs. So all your
13 scattergraphs would have to change, correct? They all assume
14 --

15 A No, the scattergraphs wouldn't. The only number that
16 would change would be the Houlihan number.

17 Q Right. So, where they were placed in the --

18 A Yes.

19 Q -- scattergraph would change? So that's everything.

20 A Well, where the Houlihan, which is the triangle, where the
21 Houlihan would --

22 Q Right. But all we care about, right, is where Houlihan --

23 A Yeah.

24 Q -- falls on this chart?

25 A Yes.

1 Q Right?

2 A Yep.

3 Q So you say only that would change: That's changing
4 everything, right?

5 A I'm sorry. I --

6 Q Because nobody here really cares about --

7 A I'm --

8 Q -- some of the other cases. We're here about this case
9 and the Houlihan retention. So that would have to change if
10 your number on total funded debt changed, correct?

11 A Yes, correct.

12 Q All right. So you have \$630 million, which is the notes,
13 right?

14 A Yes.

15 Q And the Thirty Two, LLC loan, correct?

16 A Yes.

17 Q Did you put any unsecured debt in there?

18 A No.

19 Q Any trade? No? Okay. You didn't include the Blue Torch.
20 Now, that was funded and owed by the company as of the filing.
21 Whether or not your clients like it or thought it was right,
22 that's for another day, but that was debt that existed as of
23 the petition day, correct?

24 A Yes.

25 Q So why didn't you include it?

1 A Because it was, per my notes, it was effectively a DIP
2 financing.

3 Q What does that mean, effectively a DIP?

4 A Well, the preamble of the Blue Torch facility said that it
5 was done in contemplation of a filing promptly after the loan
6 and that it was put in place to fund the costs of liquidity of
7 a Chapter 11 case. So that's basically a DIP financing. The
8 company chose to do it two days before filing. That's fine.

9 Q But if it was out three months before, would it make a
10 difference?

11 A That might have made a difference, yes.

12 Q Why? It's still the money --

13 A Well, it might not have been -- it might not have been in
14 specific expectation of a filing. I don't know.

15 Q But what does -- how does that influence whether or not
16 the debt -- the debt still needs to be dealt with in a plan,
17 correct?

18 A Yes.

19 Q Okay. A DIP doesn't, because a DIP requires that it's
20 paid off at confirmation, so it's different. And you don't
21 deal with a DIP in a reorganization because the DIP has to be
22 paid off, correct?

23 A Yes.

24 Q Okay. So this is not that.

25 A The analysis was of fees to be earned as a percentage of

1 prepetition debt, and in all these --

2 Q That's still pre -- that is prepetition debt, though.

3 A Yes. But in all these cases, there were -- many of these
4 cases had DIP loans. And if I had wanted to do apples-to-
5 apples, I would have had to have added the DIP loan to every
6 case that was comparable --

7 Q No, you would not.

8 A -- in order to show --

9 Q No, you would not.

10 A Because this was a DIP loan in my mind.

11 Q It's not a DIP loan.

12 A I understand you --

13 Q It's prepetition. And a DIP loan, there is nothing to do
14 about it. Right? Because it has to be paid off at
15 confirmation. This still needs to be dealt with. So, in
16 fact, --

17 A There's --

18 Q Let me ask you another question. In those cases with the
19 DIP loans, would that investment banker have been able to
20 charge a different -- an additional fee for obtaining that
21 DIP?

22 A Well, you'd see from the comparables that there are --
23 there are -- it's all over the place. There are DIPs that did
24 have a fee, DIPs that didn't have a fee, so I --

25 Q Do you know how many of them?

1 A I would have to go through and detail them specifically.

2 Q All right. *Philadelphia Energy*, that was one of your
3 cases, right? That's in your chart.

4 A Okay.

5 Q Okay. Did PJT -- was PJT entitled to a DIP fee in that
6 case?

7 A If you don't mind, I would -- I would refer to the notes
8 that were also Exhibit F. So, on that one, there was a 50
9 percent of the DIP fee was credited against any capital raise
10 fee applicable to financing of a first loss position that was
11 done with an affiliate. Otherwise, the DIP fee of \$1.2
12 million was earned and paid prepetition. So, yes, there was a
13 -- there was a DIP fee paid to PJT.

14 Q Okay. So, *VER Technologies*, okay, another PJT case, was
15 there a DIP fee in that case?

16 A In fact, under the final retention papers on -- *VER*
17 *Technologies*?

18 Q *VER Technologies*.

19 A PJT actually agreed to take no financing fee on the
20 approved restructuring --

21 Q Really? I have the -- I have the engagement letter right
22 here.

23 A But I have the final fee -- that would have come from the
24 final fee application, where they --

25 Q But I thought you were comparing potentials, not final

1 fee.

2 A And the --

3 Q I thought you were comparing potentially -- that's what
4 you would -- oh, I'm sorry. That's what you're doing for
5 Houlihan. I forgot. I apologize. It's only for Houlihan
6 that you're comparing, right, the potential fees.

7 A So, in the -- I believe --

8 Q In the letter, though, there was a right to a fee, wasn't
9 there, in the PJT letter?

10 A I would have to go back and look. I know that on my --

11 Q Well, I can help you out. Can we have that? Can I have
12 the *VER Technologies*?

13 MR. CALIFANO: Your Honor, may I approach?

14 THE COURT: You may. Thank you.

15 BY MR. CALIFANO:

16 Q Can you please turn to the bottom of Page 2?

17 A Yes.

18 Q Okay. And the carryover paragraph, Romanette III, the
19 carryover paragraph?

20 A Yes.

21 Q Okay. Does that help you with respect to whether or not
22 they could be entitled to a DIP fee?

23 A Yeah. This looks like that they would be entitled to a
24 one percent --

25 Q Okay.

1 A -- fee on senior debt, yes.

2 Q So, in your chart, you really effectively penalized
3 Houlihan twice, because you took the Blue Torch \$70 million
4 out and then you also tried and credit against them their
5 prepetition fees, correct? Excuse me.

6 A I'm sorry. I was just reading the remainder of the
7 paragraph where there was a reduction of the fee when provided
8 by creditors, but I --

9 Q Well, is Blue --

10 A I'm not sure if that relates to this case or not.

11 Q Yeah, it doesn't, does it? Because Blue Torch was not a
12 creditor --

13 A Yeah.

14 Q -- at the beginning.

15 A That's correct, yes.

16 Q So, okay. So, do we have to go through all of these? But
17 if I -- would you take my representation that one, two, three,
18 four, five, six, seven, eight, nine of your comps had DIP fees
19 in the engagement letters, so we don't have to go through each
20 one of them?

21 A I'm sorry. Just DIP fees on their own that were charged?

22 Q That the engagement letters --

23 A Yeah.

24 Q -- had DIP fees?

25 A Yeah.

1 Q Okay.

2 A Right. That seems reasonable.

3 Q So you're penalizing Houlihan twice here by taking the \$70
4 million out of the base that you calculate and then crediting
5 -- and arguing that they -- not giving them credit for another
6 fee that they would have gotten as a DIP, correct?

7 A I don't think so.

8 Q Okay. Well, I do. You talked -- *David's Bridal*. What
9 kind of business was that again?

10 A I'm sorry. Say it again?

11 Q What kind of business was *David's Bridal*?

12 A Oh, *David's Bridal*?

13 Q Yes.

14 A A retail --

15 Q Okay. Retail?

16 A Retail bridal business.

17 Q Is a retailer different than a helicopter company?

18 A Yes, of course.

19 Q Okay. And are retail leases different than helicopter
20 leases?

21 A Yes.

22 Q Okay. Do you think that helicopter lease restructuring --
23 that lease restructuring is important in a helicopter case?

24 A Yes, I might, yes.

25 Q Okay. Do you -- would you -- now, in *CHC*, are you

1 familiar with the fact that CHC hired another firm, Seabury,
2 to do the lease restructuring, correct?

3 A Correct.

4 Q And Houlihan is doing that here.

5 A But it's a totally different number of, as we said, *CHC*
6 has a billion three of operating lease obligations compared to
7 \$140 million in PHI, so there's a totally different level of
8 activity, I think, in *CHC* than Houlihan would have here.

9 Q It's still part of the obligations --

10 A Yes.

11 Q -- that Houlihan needs to deal with, right?

12 A Well, it's still part of the activities, for sure. In
13 every other case, --

14 Q But it's still an obligation. You said \$130 million. An
15 obligation that Houlihan has to deal with.

16 A My answer would be that on all the other cases that -- for
17 example, you talk about retail. The investment banker would
18 spend a lot of time also negotiating and thinking about
19 rejecting and assuming retail leases. So in all of these
20 comparables where there are operating leases, it would be
21 fairly normal for the banker to be actively involved in the
22 analysis and negotiation of leases. There may be different
23 types of leases, and I agree that helicopter leases --

24 Q But you think the analysis is the same dealing with a
25 retail store lease as opposed to restructuring a multimillion

1 dollar helicopter lease, when you need the helicopter to
2 operate? I mean, you think it's the same thing?

3 A Well, I think there's --

4 Q I'm just asking you if you think it's the same thing.

5 A It's not -- obviously, it's not the same thing.

6 THE COURT: Let --

7 MR. STONE: Your Honor, again, if he would --

8 THE COURT: I'm about to --

9 MR. STONE: -- just allow him to answer, it would
10 really be --

11 THE COURT: I think I was about to say the same
12 thing, Mr. Stone.

13 MR. STONE: Yeah.

14 MR. CALIFANO: Okay.

15 THE COURT: If you would, Mr. Califano, let him
16 finish his answer.

17 MR. CALIFANO: Yes, Your Honor.

18 BY MR. CALIFANO:

19 Q When you prepared Exhibit A, why did you put the
20 prepetition fees in that top line?

21 A Because my analysis on Exhibit B, my -- the way I think
22 the best -- this is best analyzed is to look at all the fees
23 that are earned in -- under one engagement letter, whether
24 it's pre or post, partly because there's a lot of these cases
25 where there's quite a bit of crediting of prepetition fees.

1 So, in order for it to be, I think, a good, useful analysis,
2 my view is that you look at the all-in fees earned from the
3 beginning of the engagement letter forward, so --

4 Q Did you look at that for all your comparables?

5 A Yes, I did.

6 Q You did?

7 A Yes, I did.

8 Q You went back and you went --

9 A Yeah. That's what I --

10 Q -- through every one of them?

11 A That's what I did.

12 Q Okay. Now, what do you base -- now, if a court is looking
13 -- a bankruptcy court is looking at the reasonableness of the
14 fees, do they typically look at prepetition fees?

15 A I'm -- yes, because I think in the -- in a lot of the
16 declarations, there's always a declaration of how much has
17 been earned prepetition, and I'm sure that the courts must
18 take into account what the banker has earned prepetition as
19 well as what he expects to earn postpetition, particularly
20 when there are credits involved in the postpetition agreement
21 versus prepetition fees, for example.

22 Q Can you cite to a bankruptcy court decision when the --
23 where the court took into account --

24 A I can't cite a decision, no.

25 Q Can you cite to any treatise where --

1 A No.

2 Q Okay. Can you cite to any, any source for your
3 specialized knowledge as an expert in fees that --

4 A It was just my judgment of doing it for 30 -- 25 years,
5 that those were the types of considerations we took into
6 account.

7 Q And who is we?

8 A I, as the investment banker, in Greenhill, Miller
9 Buckfire, Blackstone, and Wasserstein Perella.

10 Q Okay. So how did you take it into account in your role as
11 an investment banker?

12 A I'm sorry. How did I take what into --

13 Q How did you take it into -- how did you take it into
14 account in --

15 A The total of prepetition --

16 Q Yeah. How did you?

17 A Oh. I'm sorry. That most of these engagement letters
18 were done -- would have been done several months or maybe a
19 number of year before you ended up filing. So engagement
20 letters were usually a total fee that you were going to earn,
21 some of it prepetition, some of it postpetition. And the
22 negotiation that took place would have incorporated all of the
23 fees that you were going to earn, some of them prepetition and
24 some of them post.

25 Q Let's talk about the pace premium or what you would call

1 the speed premium. Why is that not reasonable?

2 A I think I -- I had said I thought that there was
3 sufficient incentive for the investment banker to generally
4 get the case done on a rapid basis, both because his fee is a
5 fixed fee generally, and so the quicker that he can earn his
6 fee the better it is for them, and usually the monthly
7 crediting was the manner in which bankers were incentivized to
8 move a case along, because after a certain period you would
9 start getting credits, as in this case. Your monthly would be
10 credited. And so the longer it went on, the less you earned
11 on the monthly.

12 So, in general, I felt that in most cases you didn't need
13 to have an incentive to the banker to move quickly because he
14 was already incentivized to do that.

15 Q Well, I think in your calculation on Exhibit A to 33, you
16 have them earning \$600,000 more in monthlies, okay, so --

17 A But overall I have them earning less.

18 Q But that's because of the pace premium, --

19 A Yeah.

20 Q -- right? Okay.

21 A Yeah.

22 Q So, absent the pace premium, --

23 A All right.

24 Q -- there wouldn't be an incentive to move things quickly?

25 A This happens to be the way the monthly crediting worked,

1 yes.

2 Q Okay.

3 A And --

4 Q So the pace premium does have a role here, correct?

5 A It potentially has a role here to move it --

6 Q Okay.

7 A -- forward.

8 Q What would be -- if the case comes out within the pace
9 premium time, how much more would Houlihan earn?

10 A Well, they didn't -- I mean, the restructuring fee is
11 \$900,000 more.

12 Q So, it'd be nine --

13 A And what do you comparison against?

14 Q What would -- what would -- okay. So, say if the case
15 lasts five months and 29 days, how much more do they make than
16 if the case lasts six months and one day?

17 A Yeah, that's pretty much what we tried to lay out, was
18 they --

19 Q Yeah. So what is that number?

20 A They would earn about \$600,000 more.

21 Q Six hundred thousand?

22 A Under this analysis, yes.

23 Q All right. So do you -- what do you think the monthly
24 administrative expenses are for this case?

25 A I'm sure they are substantially more than that, yes.

1 Q Do you think they exceed \$600,000?

2 A I don't know, but I know these cases are expensive.

3 Q If you look around this room, you probably have \$600,000
4 today, probably.

5 A I'm sure. Yeah.

6 Q So, and is there wear-and-tear on a company for being in
7 bankruptcy?

8 A Yes, I agree.

9 Q Okay. And there are higher costs, other than professional
10 fees?

11 A I would -- yes, I imagine so.

12 Q Okay. And is it disruptive to the company and their
13 relationship with customers?

14 A In general, it, depending on how it's managed, yes, it can
15 be disruptive.

16 Q Okay. And does it cause problems with employees?

17 A Yes.

18 Q Okay. So do you think that all those problems, plus the
19 administrative expenses, right, for my firm, for Milbank, for
20 Milbank's local counsel, for the rest, do you think that the
21 total sum of that, if the case goes seven months, is more or
22 less than \$600,000?

23 A I agree. It's probably -- the expenses, I'm sure, would
24 be more than \$600,000, yes.

25 Q Okay. So there's a benefit?

1 A Yeah.

2 Q Okay. And the benefit is increased the sooner they're
3 out?

4 A I agree.

5 Q Right?

6 A Yes.

7 Q Okay. And the longer we're in, the less -- the more it
8 costs the company, correct?

9 A Yes, I agree.

10 Q So, looking at it that way, do you still think the premium
11 is unreasonable?

12 A Well, my comment was that the premium was unusual because
13 there's no other cases that have it. But I agree that it's
14 not unreasonable to have a motivation to move --

15 Q There's a lot that's unusual in this case, but unusual
16 doesn't always mean improper, does it?

17 A Not necessarily.

18 Q Okay. But here, there is a benefit? You will admit there
19 is a benefit if they meet the pace agreement?

20 A Uh, --

21 Q There's a tangible dollar benefit?

22 A Yeah. I agree.

23 Q Okay. Now, when was the last time you testified in court?

24 A It would have been on the *C&J Services* matter.

25 Q Okay.

1 A In Houston.

2 Q And what happened in that case?

3 A We were seeking a motion for an equity committee, and that
4 motion was rejected.

5 Q Okay. That was before Judge Jones, right?

6 A Yes, it was.

7 Q Okay. And you were there as the valuation expert,
8 correct?

9 A Yes.

10 Q What did Judge Jones think of your testimony?

11 A He didn't think much of it.

12 Q Yeah. He was highly critical of it, wasn't he?

13 A He was critical without us understanding what he was
14 critical of, but yes, he was critical of it, yes.

15 Q He was critical of your testimony in particular, correct?

16 A I think he was critical of the whole process.

17 Q All right. This is from Judge Jones' oral opinion in *CJ*
18 *Holding Company* on November 4, 2016. And he stated on Page
19 204, "I also read the expert report. And while I didn't
20 choose to exercise the right that I had to ask questions, I
21 could have, and I will tell you there are things in that
22 expert report that bother me a great deal. There are
23 conclusions that could not possibly have been reached. There
24 are conclusions that the witness was not qualified to give."

25 Is that --

1 A That's the statement. Yes, that's from the transcript.

2 Q Isn't that really what's happened here? Didn't you get
3 hired by Oaktree, being told they had a problem with the fees,
4 didn't you compare actuals versus potentials, didn't you
5 deduct numbers arbitrarily to fit this thing within your chart
6 that I can't remember the name of? Isn't that what happened
7 here?

8 THE COURT: Hold on, Mr. Lewis.

9 MR. STONE: Your Honor, I object. It's argumentative
10 and compound.

11 THE COURT: Compound.

12 MR. CALIFANO: Okay. I think I made my point. Thank
13 you, Your Honor. I don't have any further questions.

14 THE COURT: Does anyone else have any questions of
15 the witness before Mr. Stone gets the witness?

16 All right. Mr. Stone, your witness.

17 REDIRECT EXAMINATION

18 BY MR. STONE:

19 Q Mr. Lewis, you were asked about the *Fleetwood* matter.
20 What were the circumstances of your retention in that case?

21 A That case was a case we were asked to be involved in where
22 the company was rapidly running out of cash. It had about
23 three or four months of cash left. And this was in the depths
24 of the financial crisis in 2008, early 2009. And we were
25 asked to step in and try to figure out a way to save the

1 company, either to sell it in parts or whole, or potentially
2 to try to restructure it, but that was highly unlikely. And
3 every indication was that, if we couldn't do that, it would
4 move into liquidation pretty quickly.

5 Q Okay. And why were the fees structured the way that they
6 were?

7 A So, as I said, we structured it because we thought that we
8 might spend two or three months in extremely active work. We,
9 as a firm, don't bill by the hour, so we, like all investment
10 banks, billed monthly. So, in that circumstance, we felt that
11 we wanted to structure it so that if we spent three months of
12 highly-active work but then it turned out that we couldn't
13 save the company and it was liquidated, we wanted to be
14 compensated in some way for that extreme press of work that we
15 would have done.

16 So we front-ended the agreement where we had a million
17 dollars paid prepetition. And that ran through the -- into
18 the third month of postpetition without any other fees, and
19 then we went into a monthly fee thereafter. A hundred percent
20 of those monthly fees were credited against any final fee, and
21 the total fee was capped at \$3 million on a business that had
22 \$320 million of debt. So our total fee was basically \$3
23 million on \$320 million, about one percent of debt.

24 Q And what was the environment like in 2009 when you did the
25 *Fleetwood* case, in terms of the supply and demand for bankers?

1 A Well, it was pretty active. And, yeah, it was -- it was a
2 very busy time and the financing market was extremely
3 difficult. Very hard to find financing for a company of that
4 nature with those problems.

5 Q Now, Mr. Califano took you through some questioning about
6 whether you were looking at actual fees and comparing them to
7 potential fees. Do you recall that?

8 A Yes.

9 Q On your Exhibit B, --

10 A Did you say Exhibit B?

11 Q Yes.

12 A Yes.

13 Q When you looked at the -- you looked at the monthlies and
14 you looked at the restructuring fee and you looked at the
15 financing fees that were contained there, were you -- were
16 those potential or were those actual?

17 A These would have been all potential. These were in the
18 engagement letter, so no indication as to --

19 Q Right. And so at the bottom, where you did your analysis
20 of the proposed Houlihan fees, you were comparing potential to
21 potential; is that right?

22 A That's correct.

23 Q Okay. In terms of a DIP fee, if you go -- if you turn
24 back to Exhibit A, how did you treat the Houlihan fee on the
25 Blue Torch facility?

1 A Well, we include it in the total fees that Houlihan earned
2 on the assignment. We -- even though it was paid prepetition
3 on a two-days-before-petition financing, we -- I believed that
4 to be essentially a DIP financing, a good financing,
5 presumably. But they -- we included the fee in there because
6 our analysis of all-in fees went back to the beginning of the
7 engagement for all of the comparables, and therefore it made
8 apples-to-apples comparisons appropriate to look at all the
9 prepetition fees that related to the specific assignment that
10 was under the engagement letter.

11 Q Finally, tell the Court a little bit more about your
12 testimony in the *C&J Services* matter. Why was the Court
13 unhappy with that testimony?

14 A Um, --

15 MR. CALIFANO: Objection, Your Honor. How does he
16 know why the Court was -- how does he know why Judge Jones was
17 unhappy with --

18 MR. STONE: I'll withdraw that part of the question.

19 THE COURT: Why don't you rephrase your question, Mr.
20 Stone.

21 MR. STONE: Yes, Your Honor.

22 THE COURT: This time, don't speculate.

23 MR. STONE: Yes.

24 BY MR. STONE:

25 Q Tell, the Court more about your testimony in the *C&J*

1 matter.

2 A We provided a -- we were asked to step into a situation
3 about a month before confirmation of that plan by a number of
4 hedge funds who were unhappy with the structure of the plan.
5 That plan had proposed a valuation for C&J for \$700 million
6 against a total prepetition debt of between \$1.4 billion and
7 \$1.5 billion. And a number of the hedge funds were unhappy
8 with that valuation.

9 There was also a rights issue being done at a discount to
10 the \$700 million, the \$600 million.

11 And we were asked to prepare a valuation that would give
12 the Court some level of comfort that there was an argument to
13 be made that there might be value above the \$1.5 billion of
14 debt that ought to go to the equity.

15 So we prepared a pretty top-level valuation. We
16 understood that it wasn't a detailed -- we didn't have access
17 to the company's cash flow projections and the like. But we
18 took a general understanding of the way companies were trading
19 at that moment, and at that point there was a great
20 expectation that the oil business was going to turn around in
21 2017 and that it was going to go back up. And so all the
22 stocks were trading significantly -- at a significant premium,
23 even though they were all -- most of the services companies
24 were negative cash flow, the stocks of undistressed companies
25 were looking good.

1 And our argument was that this company probably should be
2 worth \$2-1/2 billion plus, based on direct comparables of
3 similar companies in its business. And we made that
4 proposition to the judge. And it was -- and we accepted that
5 it was a very high-level analysis. And, in fact, the judge
6 rejected it. He -- they went forward with that plan at \$700
7 million. And on day one of the plan, the equity traded at \$41
8 a share with 50 million shares outstanding. So the market
9 valued that business at \$2-1/2 billion on the day of the
10 confirmation of the hearing.

11 And we felt that our valuation had been justified. We
12 believed it was a fair valuation. It just -- it wasn't
13 accepted in the context of the case that was heard. But we
14 think that the actual value that the market showed that
15 company to be worth vindicated our valuation, at the end of
16 the day.

17 MR. STONE: No further questions.

18 THE COURT: Does anyone --

19 MR. CALIFANO: Your Honor?

20 THE COURT: Anyone else have any questions for Mr.
21 Lewis?

22 MR. CALIFANO: I just have a couple of recross.

23 THE COURT: Okay.

24 MR. CALIFANO: I'll be very brief, Your Honor.

25 RECROSS-EXAMINATION

1 BY MR. CALIFANO:

2 Q Just referring to Exhibit B, --

3 A B?

4 Q B, your --

5 A Yes.

6 Q -- declaration. That's -- the assessment of Houlihan
7 still depends on limiting the funding -- funded debt to \$630
8 million; is that correct?

9 A Yes.

10 Q Okay. So its position in this chart would change if the
11 Blue Torch financing was included, correct?

12 A Yes.

13 Q Okay. And it would change once again if you counted the
14 helicopter leases?

15 A Correct. My -- my --

16 Q Thank you.

17 A My judgment would be that's not the correct analysis.

18 Q Okay. But I just asked --

19 A But yes, I agree with you on that, yeah.

20 Q Okay. Now, you -- I think you were testifying when Mr.
21 Stone asked you about *Fleetwood*, that that was a special case
22 and that was a unique circumstance and the fee reflected that,
23 correct?

24 A Yes.

25 Q Okay. Do you recall testifying in a *Fleetwood* case? I'll

1 just -- and this is your quote. "I respectfully submit that
2 this fee structure, which is similar to fee arrangements which
3 have been authorized in other Chapter 11 cases in which
4 Greenhill and other leading investment bankers have rendered
5 services, is reasonable in light of industry practice, has
6 market rates both in and out of Chapter 11 proceedings, and --
7 based on the individuals' experience and the scope of work to
8 be performed." Correct?

9 A Yes.

10 Q So back then, you were saying it was market?

11 A I was saying the overall -- the overall structure, which
12 included a \$3 million cap, I was saying that number. I didn't
13 define the individual pieces of the structure, but the overall
14 fee I said was --

15 Q Well, didn't you just say that it was unique based on the
16 circumstances of that case?

17 A The structuring of it was unique, yes.

18 Q Okay. So, back then, you said it was market; now you're
19 saying it's unique?

20 A No.

21 MR. STONE: Object, Your Honor. Argumentative.

22 THE COURT: Sustained.

23 BY MR. CALIFANO:

24 Q All right. Now, you say in C and -- and we get to C&J.
25 You say you were brought in by a hedge fund that was upset,

1 correct?

2 A I don't know if it was upset. I was brought in by a hedge
3 fund who argued --

4 Q Those are your words. How is that different from here?
5 Weren't you brought in by a hedge fund that was upset with the
6 Houlihan fees?

7 A I don't know how to answer that. I was -- I was asked
8 whether I'd provide testimony from a hedge fund, yes, who --

9 Q Okay.

10 A -- was unhappy with the fee level. Yes. Agree.

11 Q So the same as C&J, correct?

12 A Oh, C&J was a much more complicated issue. It was a
13 valuation issue. And it was a much bigger deal and much more
14 complicated, yes.

15 Q Okay. I didn't read all of Judge Jones' quote about you
16 because I didn't want to go too far, but now that you've
17 brought it up, I feel like I have to. And this is what he
18 said about your report. "But to deliberately cut corners in
19 an effort to mold the truth is something that may be done in
20 other jurisdictions but not in the Southern District of Texas
21 and not in Courtroom 400."

22 Do you remember him saying that?

23 A Yeah.

24 Q Okay.

25 MR. CALIFANO: No further questions, Your Honor.

1 THE COURT: Mr. Stone, do you have any other
2 questions of Mr. Lewis?

3 MR. STONE: I do not, Your Honor.

4 THE COURT: Mr. Lewis, it's probably not relevant for
5 today, but what was the business of *Fleetwood*? I guess I'm
6 not familiar with it.

7 THE WITNESS: Oh, a recreational vehicle
8 manufacturer.

9 THE COURT: Okay. Just big --

10 THE WITNESS: An RV business.

11 THE COURT: RVs? Yes. You may step down, sir.

12 THE WITNESS: Thank you.

13 (The witness steps down.)

14 MR. LEBLANC: Your Honor, we have no further
15 witnesses.

16 THE COURT: Thank you. Does the Debtor intend to
17 call another witness?

18 MR. CALIFANO: Your Honor, if we could just have five
19 minutes. I'm sorry to impose on your patience.

20 THE COURT: You're not --

21 MR. CALIFANO: But five minutes to decide whether we
22 want to do rebuttal or not.

23 THE COURT: You're not imposing on my patience yet,
24 Mr. Califano.

25 MR. CALIFANO: Well, Your Honor, we did settle the

1 other things, so --

2 THE COURT: All right. You know I'm joking. Five
3 minutes.

4 MR. CALIFANO: Your Honor, I have to stay in your
5 good graces because tomorrow I've got --

6 THE COURT: You'll be back. Five minutes. All
7 right.

8 (A recess ensued from 3:11 p.m. to 3:16 p.m.)

9 THE CLERK: All rise.

10 THE COURT: Good afternoon again. Please be seated.
11 Thank you. Mr. Califano?

12 MR. CALIFANO: Your Honor, we have no further
13 witnesses.

14 THE COURT: All right. How long would you all like
15 for closing on this motion?

16 MR. CALIFANO: I don't need long, Your Honor. I
17 don't need long at all.

18 THE COURT: Ten? Would that be enough?

19 MR. LEBLANC: That would be fine with me, Your Honor.

20 THE COURT: Ten per side? And I think the United
21 States Trustee still has a single issue, right?

22 MS. KIPPES: Yes, Your Honor. I think I can get that
23 done in under five.

24 THE COURT: Okay. All right. Mr. Califano, you get
25 to go first and last.

1 CLOSING ARGUMENT ON BEHALF OF THE DEBTORS

2 MR. CALIFANO: Thank you, Your Honor.

3 Your Honor, we're here on Houlihan's retention. And, you
4 know, based on the context of this case, as you can tell by
5 the objection, the objection went into a lot of things that
6 really weren't relevant to -- the objection as filed --
7 weren't really relevant to their retention. Not their
8 qualifications. That stuff, I'm not going to address, but
9 obviously you can see some motivation here.

10 The Houlihan fee has been revised in response to the
11 creditors' concerns, okay? The vast majority of their
12 concerns related to these potential fees. Now, one fee that
13 they crowed about, Mr. Niemann has said repeatedly, and the
14 order will reflect, he's not seeking anything for the Blue
15 Torch exit.

16 With respect to the rights offering, those rights
17 offerings have come out of the plan. But we all should
18 remember that the only way that those rights offerings ever
19 came into the plan were if the creditors accepted the plan and
20 agreed to fund. Okay? So it was always in their discretion.
21 It was always their decision. It was not a fee which was
22 going to be imposed upon them. Because, as Mr. Niemann said,
23 if they thought the fee was too high, they would say, well,
24 we'll put the money in, but only if you cut your fee.

25 So it was a red herring, okay, Your Honor. It was pointed

1 to. It's out of the plan now. And it was never something
2 that Houlihan could have gotten absent the creditors' approval
3 and consent.

4 The balance of the fee, Your Honor, is reasonable.
5 \$200,000 a month is reasonable, especially under the
6 circumstances.

7 A number of the comps they're using are prepacks. Very
8 different on the monthlies for a prepack. You don't have the
9 extent of the work that is being done. So I don't think we
10 can look at those prepacks or prearranged cases, or the case
11 where the secured creditor was being -- was bidding in in a
12 363 sale in (inaudible). I don't think any of those are
13 relevant.

14 I think the one thing you can take away, probably the only
15 thing you can take away from Mr. Lewis' testimony, is that
16 each one of these cases is different, Your Honor.

17 In the context of this case, this is an extremely
18 reasonable fee. Okay. You can't ignore the helicopter
19 leases, because as we said from the beginning, one of our
20 major tasks is restructuring those leases. And we're dealing
21 with 15 different lessors and we're valuing helicopters and
22 making deals based on market value. That's significant work.
23 You can't discount that.

24 You can't discount the Blue Torch facility just because
25 you don't like it or because it's unusual. It still is funded

1 debt that needs to be dealt with as part of the plan.

2 So if you put those numbers back in that I think Mr. Lewis
3 arbitrarily took out, well, then it's smack in the middle of
4 all of his charts, Your Honor. And I think that's what's
5 reasonable, and I think that's what's reasonable under the
6 facts and circumstances of this case.

7 And the Code doesn't say that the debtor-in-possession
8 gets to hire people on market terms. The Code says on what's
9 reasonable. And we think this is reasonable in the context of
10 this case.

11 Now, the speed premium, Your Honor, I would think the
12 creditors would like that. Well, we call it the pace premium;
13 they call it the speed premium. I would think they would like
14 that, because that saves money. And in a case like this,
15 where we have said from the beginning the new owners of this
16 company are going to be the creditors, we've said that from
17 the beginning -- there is nothing -- which is one reason why I
18 don't understand the fighting that we're doing -- but we've
19 said from the beginning the creditors will be the new owners.
20 Because of that, I would think they would appreciate that
21 premium, because the premium is a fraction of what this case
22 will cost if it's extended. The premium is a fraction of the
23 negative impacts from Chapter 11 on this case.

24 And then, once again, Your Honor, this is in their
25 control. It's in the control of the creditors. Because if we

1 don't emerge -- and at the same time they're complaining about
2 a pace premium, they're doing everything -- they were doing
3 everything they could to slow the case down, but I think that
4 has changed -- but I would think that they would like the pace
5 premium. I would think the pace premium, from the creditors'
6 standpoint, would be the new standard. I mean, Mr. Lewis
7 testified that, even though it's unusual, it is beneficial.
8 It benefits the estate. So why should we disregard something
9 that benefits the estate just because it's new and novel?

10 Okay.

11 Now, the Debtor -- the pace premium was very important to
12 these Debtors. It was very important to these Debtors.
13 Because as you've heard from -- in every hearing, they need to
14 get out quickly. This is not a company which will fare well
15 in Chapter 11. There's a lot of competition and there are a
16 number of competitors that are in trouble, so there is a
17 reason for the pace premium.

18 You've also heard Mr. Bospflug testify that Houlihan has a
19 unique skillset, understanding, and they have been very happy
20 with their performance and they were impressed by their
21 performance and their skillset.

22 Now, can we compare in each one of those cases, which I
23 think the chart was distorted because they dropped out \$200
24 million in real debt, but are we comparing each one of those
25 bankers to their skillset? No. But I think we have here, we

1 have a fee which is reasonable, especially once the
2 clarification is made about what they're seeking and what is
3 no longer in the plan, and we have a debtor who is saying,
4 They have proven that they're, you know, that they're
5 qualified, and we want them and we need them.

6 I think, under the circumstances, Your Honor, there really
7 is no basis for this objection. This basis is a spillover of
8 a lot of the rancor that I hope is about to leave this case.
9 But we haven't heard anything today from Mr. Lewis or from the
10 cross of Mr. Niemann or from anything else that would indicate
11 that it is unreasonable for this Debtor to hire Houlihan based
12 on these terms.

13 Thank you.

14 THE COURT: Would you mind, on the record -- you said
15 it in opening, but I just want to make sure I have this
16 straight -- the discount that you discussed, the 30 percent
17 discount?

18 MR. CALIFANO: Yes, Your Honor. And this was arrived
19 at between -- and, you know, I wish we could have had a
20 counterparty, but the company saw the objections, saw where
21 the objections were focused, and these two changes came at the
22 same time, rights offering and discounted buyout coming out of
23 the plan. Okay. So that changes a lot of the math.

24 But then on the financing transaction fees, they've all
25 been reduced by 30 percent. So the two percent fee for

1 secured financing is dropped to 1.4 percent. The three
2 percent fee on unsecured financing is dropped to 2.1 percent.
3 And then the equity raise is dropped from six percent to 4.2
4 percent.

5 And I will tell Your Honor that two and three were the
6 same numbers that Mr. Lewis testified in favor of back in
7 2009, but they have -- Houlihan has agreed with the company to
8 reduce those fees, and the company has agreed and offered up
9 to the creditors that we'll drop those two most objectionable
10 portions of our plan. And we will be filing this week an
11 amended plan, an amended disclosure statement, that drops
12 those two provisions that gathered so much ire.

13 So, Your Honor, once again, I think under these
14 circumstances it's clearly reasonable to hire Houlihan on the
15 terms in their engagement letter as modified by the agreement
16 today. Thank you.

17 THE COURT: You get to go last. And in your last
18 pass, if you would address what we know is the United States
19 Trustee's issue, all right?

20 MR. LEBLANC: Yes, Your Honor.

21 CLOSING ARGUMENT ON BEHALF OF THE UNSECURED CREDITORS' COMMITTEE

22 MR. LEBLANC: Good afternoon, Your Honor. Andrew
23 Leblanc of Milbank on behalf of the Official Committee.

24 Your Honor, let me just try to address very quickly the
25 issues we have, and they're twofold. I mean, the first one,

1 Mr. Califano can say that the fees are reasonable, but they're
2 literally off the charts, and I mean that. Even Mr. Niemann's
3 own chart of monthly fees shows that \$200,000 a month is off
4 of the chart. He admitted today under cross-examination that
5 the \$200,000 -- the one fee that was \$200,000 was an out-of-
6 court case. It didn't have to come in before Your Honor. It
7 didn't have to get approved. So there's literally not a
8 single case in his study that has a fee that is \$200,000, but
9 theirs does. Mr. Lewis' evidence is exactly the same. It's
10 literally off the charts.

11 But Your Honor, it's in some respects the wrong way to
12 think about this, because the way to think about this is
13 what's the total all-in fee. And importantly, when the
14 company was -- apparently, when the company was being
15 presented with this by Mr. Niemann, Mr. Niemann didn't present
16 that information to the board. What the board received was an
17 analysis of just the monthly fees and the restructuring fees,
18 but that analysis shows that the monthly fee is beyond any
19 other case and that the restructuring fee is beyond any other
20 case. That's what the evidence shows. And I'll talk in a
21 minute about the debt issues, but that's what the evidence
22 shows.

23 And what he also didn't show is all of the other bells and
24 whistles that these investment banker letters have, with good
25 reason, because the crediting of fees, caps on fees, because

1 we don't know what's going to happen.

2 Now, they told us today as we walked in here that they'd
3 removed the rights offering or they will remove the rights
4 offering from the plant. It's -- that's fine. They remove
5 the rights offering. But the engagement letter still, and if
6 Your Honor approves it under 328, their fee application will
7 still provide them with a 4.2 percent fee on any rights
8 offering.

9 So, if as the future owners of the company, the creditors,
10 if the creditors decide that they want to raise capital to
11 take out the two tranches of secured debt that are sitting in
12 front of them, they're going to have to pay Houlihan a fee.
13 And the testimony, Mr. Niemann's testimony was that'd be an
14 \$8.4 million fee, on top of the six or the \$6.9 million, on
15 top of the monthly fees, and on top of any other financing
16 fees, because there's no crediting whatsoever.

17 Mr. Lewis' evidence, which wasn't rebutted -- they didn't
18 challenge any of the evidence he offered -- showed that in
19 virtually every case there's some form of crediting, whether
20 it's from existing creditor -- whether it's crediting because
21 it's from an existing creditor or it's just crediting for
22 financing raised against the transaction fee, so that the
23 investment banker can have an expectation of an all-in fee
24 that is reasonable.

25 Now, we talked about this with Mr. Niemann, the all-in fee

1 -- and Mr. Lewis talked about it as well -- the all-in fee
2 that they calculate here, using the Debtors' current plan,
3 again, the one even extracting the rights offering, has an
4 all-in fee that exceeds \$11 million. And again, if you look
5 at Mr. Lewis' Exhibit D, which is the chart of actually-
6 received transaction -- actually-received total fees for
7 investment bankers, that is off the charts yet again. It's
8 almost two percent of the funded debt of this company that
9 would be paid in fees. It's a quarter of their EBITDA that
10 would be paid in fees, a quarter of their annual earnings that
11 would be paid in investment banker fees.

12 What Mr. Lewis testified to and what the evidence actually
13 shows is that what is market in these cases is a 1.1 percent
14 fee. That is the average fee.

15 Now, Your Honor, as Your Honor knows, that pales in
16 comparison. That's a multiple of what Your Honor approved in
17 the *Erickson* case, \$125,000 and a \$2 million transaction fee
18 with a \$3 million cap on total fees. It pales in -- those --
19 these numbers are just enormous for the type of work that's
20 being done here.

21 And there's lots of examples. We get -- because if we
22 look at *CHC*, using that case as an example and correcting for
23 the two mistakes that were made in Mr. Niemann's chart,
24 adjusting the debt for the additional \$500,000. And again, we
25 think it's wrong to include operating leases as part of that

1 analysis. It makes no sense whatsoever. It's not the funded
2 debt of the company. It is not funded debt of any company.
3 But if you want to do it and you're doing a comparative study
4 of 39 different firms and the fees that were paid in those 39
5 different firms, you have to be consistent. So, to be
6 consistent, you either have no operating lease expense as part
7 of the financing and instead you use what's in every
8 disclosure statement, what's in every 10-K, what's in every
9 first-day declaration that says, Here is what the funded debt
10 of the company is, and you use that as your metric, or you go
11 through every one of those cases and you figure out what the
12 operating lease expense is and you add it to their debt. It's
13 far simpler. You just have to compare apples to apples. You
14 can't compare apples to oranges, which is what was done here.
15 And Mr. Niemann admitted it in his analysis. He didn't
16 include operating leases for CHC. He did include them for the
17 subject company.

18 So, Your Honor, the issue we have is that these fees are
19 off the chart. And it's no answer -- even the 30 percent, if
20 you compare the 30 percent reduction in the financing fees,
21 you still have an above-market and beyond-market monthly fee.
22 You have a beyond-market transaction fee, the \$6.9 or the \$6
23 million. And you have an above-market -- even those fees,
24 once reduced, are still above the market. You can see that
25 from Mr. Lewis' work, even after being reduced by 30 percent.

1 That doesn't even take into account the fact that every
2 other one of these has crediting or a cap as a way to cabin
3 the fees.

4 Your Honor, if you were to approve this structure today,
5 and even if the plan that's proposed was -- were confirmed,
6 and this company had to pay at the end of the day more than
7 \$11 million in investment banking fees for this plan, it would
8 be very unfortunate. I think that wouldn't be consistent with
9 328.

10 Now, the other issue we have, Your Honor, I won't dwell on
11 it, but we certainly have concerns about the conduct of the
12 case and whether or not this case is being run for the benefit
13 of an insider. They can say it's not an insider plan, but
14 let's just be honest. Mr. Gonsoulin is the largest
15 shareholder of this company. He's appointed every member of
16 the director, or at least has the -- board of directors, or he
17 has the ability to remove every one of them. He's the one
18 with whom they negotiated this plan. He is the one.

19 They didn't negotiate it with unsecured creditors. They
20 proposed a plan without negotiating with unsecured creditors.
21 And Your Honor, they've done that. Okay. We're dealing with
22 it. We're going to mediation. That's all fine and well. But
23 we think there are real things that have to be investigated
24 there. That's the reason that we went back to that August
25 22nd presentation, to determine whether or not these were --

1 the structure of these prepetition negotiations were
2 Houlihan's design. And we think that's a question that needs
3 to be looked at, which is why -- and let me get to sort of the
4 finishing here, Your Honor. There is no evidence in this
5 record upon which you could approve this fee. There's no
6 evidence of actual negotiations, of changes in terms, of
7 anything like that, other than what you just had happen this
8 morning when we walked into court, that they've reduced the
9 fee.

10 What we would submit, Your Honor, would be appropriate
11 here, particularly because we are now going to mediation with
12 respect to the plan, is we think Your Honor should take this
13 *sub judice*. Allow us to have the mediation. We will deal
14 with this in the context of that mediation. You could decide
15 it at any time, obviously, Your Honor, but we think it would
16 be inappropriate for the Court to decide it now. Because if
17 there's a new plan that arises from that, then we'll either
18 know what Houlihan's fee would be under that new plan, or
19 alternatively, as Mr. Niemann said, he wants to get the fee
20 approved by this Court, but then he concedes that he's happy
21 to negotiate it if the creditors want to put in money and will
22 condition it on him taking less of a fee than this Court
23 approves. Let's just get to that step right now. Your Honor
24 could take this *sub judice*, not approve it, because we don't
25 question Houlihan's qualifications. We don't take lightly the

1 idea of standing before the Court and objecting to their
2 retention or the components of their retention that are
3 problematic to us. And let us try to deal with that as part
4 of this process as we go forward. And if we can't, then Your
5 Honor can approve -- Your Honor can decide the motion. And I
6 would submit, Your Honor, you would have to say it can't be
7 approved on this record. They've got to come back and present
8 evidence from somebody to show that it was actually
9 negotiated. And I don't think you could ever approve it on
10 this record because it literally is a fee that is off the
11 charts when you look at it on a total basis. And we know that
12 already based on their proposed plan.

13 Let's see what it is after negotiation, after we're
14 sitting in a room with a mediator. It's not going to be the
15 focus of this mediation, Your Honor, but we think it could
16 absolutely benefit from that time where people can actually
17 spend time together and see if we can get to a resolution on
18 this issue as well.

19 What we would urge, though, Your Honor, is to not enter an
20 order on this. And not -- we don't think you can approve it,
21 but certainly we don't think you should approve it today,
22 because it locks in -- it's just another point of leverage.
23 He -- Mr. Niemann said he'll negotiate his fee if people want
24 to put money in to take out that secured debt. Let's let that
25 happen now, before Your Honor approves it.

1 I'm happy to answer any questions, Your Honor, but I think
2 the evidentiary record on this was pretty clear. I don't
3 think there's any real dispute about -- there's no evidence
4 that this is a reasonable fee under any standard.

5 Unless the Court has any questions, I would -- we would
6 urge the Court to defer ruling on this motion. Or,
7 alternatively, if Your Honor is not inclined to do that, to
8 deny the motion and -- without prejudice and allow them to
9 resubmit with additional evidence and sharpening their pencils
10 on the fees.

11 THE COURT: Thank you, Mr. Leblanc.

12 MR. LEBLANC: Thank you, Your Honor.

13 THE COURT: I actually don't have any questions of
14 you. Thank you.

15 Hold on, Mr. Califano. You're still wanting to cut off
16 the U.S. Trustee, but they need to --

17 MR. CALIFANO: I'm sorry, Your Honor.

18 THE COURT: They get heard.

19 MS. KIPPES: Next time I'm going to wear a really
20 loud jacket so people can see me.

21 CLOSING ARGUMENT ON BEHALF OF THE UNITED STATES TRUSTEE

22 MS. KIPPES: Your Honor, Meredith Kippes on behalf of
23 the United States Trustee.

24 I'm going to piggyback off of Mr. Leblanc a little bit.
25 He called these fees off the charts. Noted that the all-in

1 fee with the 30 percent reduction is now \$11 million if
2 everything happens and they get everything. He noted it's two
3 percent of the funded debt. It's a quarter of EBITDA.

4 These are precisely why -- these sorts of concerns about
5 what might happen at the end is precisely why the U.S. Trustee
6 has asked for 330 review. Because as Judge -- you're Judge
7 Hale -- Judge Lynn said in the *Mirant* case, "The best measure
8 of a professional's contribution to a plan process is the
9 value of their contribution to the case." And at the end of
10 the case, we can look at, for lack of a better word, the
11 *gestalt* of the case. We can look at the whole thing and see
12 what happened and see if the fees are reasonable. There's no
13 reason to decide whether they're reasonable now. You can do
14 that at the end under 330.

15 Thank you.

16 THE COURT: Thank you. Mr. Califano, you get to go
17 last.

18 MR. CALIFANO: Yes. Sorry about that, Your Honor.

19 REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTORS

20 MR. CALIFANO: First of all, let me address Mr.
21 Leblanc. You know, and I'm going to go -- I'm just going to
22 ask Your Honor to look at two of the exhibits from their
23 expert. Because I don't know how they're getting to this.
24 Okay.

25 THE COURT: That was the 33; is that right?

1 MR. CALIFANO: Yes, 33. Your Honor, first of all, he
2 says there's no deals where there isn't a cap, and I'm just
3 going off his Exhibit B, listing a number of deals, and I
4 assume the checkmark means that there is a cap. There are a
5 number of these comparables that don't have the cap. So, I
6 just don't know where that came from.

7 But more basically, Your Honor, what happens on every
8 issue here, right, is they change it into this narrative of
9 the insider transaction and the insider plan. Well, this is a
10 public company, okay, and Mr. -- counsel for the Committee
11 loves to get up here and testify. All right. They never have
12 a witness. Today was the first time they brought one, but
13 every other time it's an empty chair and counsel is giving his
14 opinion of what's going on here. And he says, well, the board
15 is -- well, yes, Mr. Gonsoulin has 70 percent of the voting
16 rights. We said that from the beginning. It's no fact which
17 they uncovered. All right, Your Honor?

18 And I hope Your Honor got a chance, even though the 1103
19 motion is being put off, we answered their 12 questions. But
20 every time they don't like something, they slip into this is
21 an insider transaction, everything is wrong, we need to
22 investigate. They can't point to any specifics. And now that
23 the rights offering issues are out, this is a really
24 straightforward debt-for-equity plan. But they fall into that
25 at every turn.

1 And they -- then they talked about a point of leverage.
2 How can they -- how can they say that it gives us more
3 leverage than when we're going -- than it would give them if
4 we went into a mediation with our financial advisor's fee and
5 retention hanging in the balance? First of all, that creates
6 an inherent conflict. Okay. Because we have an advisor,
7 then, who knows, well, if I cut a deal here, if I advise my
8 client to cut a deal, you know, my fees will be wrapped up in
9 it. So, that creates inherent conflict. So, I just think
10 that's inappropriate.

11 But then think about the leverage it creates by putting
12 somebody's fees at risk while they're having a mediation and
13 while they're throwing around these allegations.

14 And they said they didn't come in here lightly to object
15 and they -- they came in here, obviously, with one of their
16 hedge fund clients making a call and finding somebody who
17 would come up with an opinion that mattered. That matched.

18 We have shown -- this is not an apples-to-apples
19 comparison. This was a manipulative comparison that we had.
20 They compared the potential fees that Houlihan could get to
21 actual fees given in other cases.

22 So, if you look at Exhibit A and this \$11 million number,
23 if you look at the postpetition fees, how do they get to \$11
24 million? You have monthlies of, assuming a six-month case, of
25 \$946,000 -- this is their calculation -- and a recap fee of

1 \$6,900,000. You have a potential exit ABL fee of \$3 million.
2 That's potential. There is no ABL lender in prospect right
3 now. That is a potential fee.

4 So, if the Debtor -- but now that fee has been reduced, in
5 fact, by 30 percent. So, that would be a possible \$2 million
6 if an ABL is obtained.

7 But the specific fees, the fees that are likely to occur,
8 now that the rights offerings are gone, are the transaction
9 fee and the monthlies. It's not \$11 million, Your Honor. And
10 that ABL fee is calculated on a possible -- on the maximum
11 number of a possible ABL. That's a completely different fee.
12 It is not \$11 million, as they say. There is a potential
13 upside, now reduced to \$2 million, if the full amount of that
14 ABL is raised. That's what it is.

15 So, the real fees you should be looking at are just the
16 monthly and the restricting fee. And it's a far different
17 story, Your Honor. And I don't casually throw around numbers
18 like \$11 million.

19 And with respect to the U.S. Trustees' objection, Your
20 Honor, in this court, investment bankers are hired under 328.
21 Across the country, investment bankers are hired under 328.
22 Mr. Martin -- I'm sorry, Mr. Lewis testified at his deposition
23 that 328 is the appropriate standard for investment bankers to
24 be hired. It has become standard. We cited in our papers a
25 number of cases from this district. That is typical for

1 investment bankers because they're not hourly-rate-based. You
2 can't -- it's success-fee-based. And it would be unfair to
3 retain them on a success fee basis and then look back at it
4 and recalculate it. I mean, that's what the cases say, and
5 it's -- I know in every case the U.S. Trustee is bound to
6 object to it, Your Honor, but this has become the standard.

7 So, with respect -- another thing that Mr. -- that
8 Creditors' Committee counsel testified to was that there was
9 no negotiation. Mr. Bospflug testified that he negotiated
10 this engagement letter. Okay. He negotiated it prepetition,
11 he negotiated it before this plan was in prospect and after
12 months of getting information from Mr. Niemann and assessing
13 his credit -- assessing his abilities.

14 Your Honor, there isn't any basis to deny their retention.
15 I think Your Honor has all the power, unlike my adversary. I
16 think you have the power both to grant it or deny it. I think
17 you should grant it, Your Honor. I think we need Houlihan.

18 I also think their suggestion that it be tied up in the
19 mediation is completely inappropriate, because it would then
20 create an inherent conflict between the Debtor and one of the
21 professionals it relies on.

22 So, I think the record is clear, Your Honor. I think we
23 have spent more than enough time on it. And I think we need
24 to put this to bed. This leverage issue that they have, let's
25 put it to bed, let's go on with the mediation, and I am

1 convinced that we are going to have a deal in short order.
2 But I think we have to stop letting allegations that have no
3 basis, that they've never put a witness on for, they've never
4 given a shred of evidence, and we have a mountain of evidence
5 to the contrary, they've never put it before your Court, this
6 Court, and they have avoided having these issues tested, but
7 rather, they keep trying to use them as a way to get another
8 path. Let's get past this, let's go on to mediation, and
9 hopefully next time we are before Your Honor we're going to
10 have the framework of a deal.

11 Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Califano. We'll come back
13 to a ruling in Houlihan after we've heard the other matters.

14 MR. CALIFANO: Thank you, Your Honor.

15 THE COURT: I don't know which one we should move
16 into next. Maybe the KEIP.

17 MR. CALIFANO: I think the KEIP, because the KEIP, we
18 have a proffer that the U.S. Trustee has asked for, and Mr.
19 Simon is going to read it into the record.

20 THE COURT: All right.

21 MR. SIMON: Your Honor, thank you again. Good
22 afternoon. Dan Simon, DLA Piper, on behalf of the Debtors.

23 I am pleased to announce that we have, over the course of
24 the last 24 hours and into this hearing, worked constructively
25 with the Committee to reach a deal. We have papered the deal.

1 Our client has signed off, I believe, and I'll ask Creditors'
2 Committee counsel to also confirm at the end that not only do
3 they agree with the deal that I read into the record, but also
4 that their Committee has approved that deal.

5 And so, with your patience, I will read it into the
6 record, and then I will provide a relatively brief proffer of
7 Mr. Del Genio.

8 THE COURT: All right.

9 MR. SIMON: The Key Employee Incentive Plan that is
10 attached to the motion would be approved subject to the
11 following revisions: The net operating cash flow metric would
12 switch to an EBITDA metric based on the Debtors' 2019 business
13 plan, provided that \$35 million of EBITDA would be the
14 threshold metric, and that metric would be adjusted based on
15 the timing of the exit. The \$35 million number would be
16 adjusted, that is.

17 Restructuring-related professional fees would not be
18 included in the EBITDA operating metric, and all EBITDA
19 targets are net of all amounts payable under the KEIP plan.

20 Payments under the KEIP are to be paid in all cash;
21 provided, however, that solely at each KEIP participant's
22 option and discretion, with such notice to be provided no
23 later than two weeks prior to the proposed effective date, a
24 portion of the KEIP payment may be converted from cash to new
25 equity in the Reorganized Debtor at plan value consistent with

1 past practices.

2 Upon the consummation of a restructuring transaction, the
3 maximum aggregate -- *i.e.*, for all Debtor KEIP participants --
4 -- payout in cash, if earned, will be equal to the sum of (1)
5 the threshold bonus, or \$3,182,567; (2) Fifty percent equal to
6 the incremental difference between the threshold bonus and the
7 target bonus, which is equal to \$530,428; and (3) a twenty
8 percent safety bonus on a prorated basis based on timing from
9 January 1, 2019 through the date of emergence.

10 On December 31, 2019, the company's overall performance
11 will be measured based on the KEIP metrics as outlined in the
12 KEIP and as modified by what I'm describing now, with the
13 company to pay, at the time the annual incentive plan payments
14 are made, consistent with past practices, the incremental
15 difference in cash, up to the maximum amount contemplated by
16 the KEIP.

17 Subject to the next provision, all cash payments made upon
18 the consummation of a restructuring transaction shall be
19 accrued, earned, payable, and not subject to clawback.

20 That next provision is as follows: If any KEIP
21 participant leaves before the later of (1) when the company
22 pays amounts due at the time the annual incentive plan
23 payments are made, consistent with past practices; or (2)
24 April 1, 2020, there is a full clawback of (a) fifty percent
25 of the incremental difference between the threshold bonus and

1 the target bonus, in an amount not greater than \$530,428, to
2 the extent actually paid; and (b) the prorated safety bonus,
3 to the extent actually paid; provided, however, that if the
4 KEIP participant is terminated without cause, there is no
5 clawback, and if the KEIP participant is constructively
6 terminated, and that term will be agreed upon by the parties,
7 there is no clawback.

8 As provided in the KEIP plan, the KEIP participants may be
9 entitled to receive payment under the KEIP for multiple sale
10 transactions; provided, however, that in the event that a sale
11 transaction occurs in conjunction with a restructuring
12 transaction, the KEIP participant shall only be entitled to
13 receive one payment equal to the greater of the KEIP payment
14 attributable to such sale transaction or the restructuring
15 transaction fee for the entire transaction. And a sale
16 transaction that occurs post-emergence shall not give rise to
17 any payments under the KEIP plan unless such sale transaction
18 would result in payments greater than amounts payable under
19 the KEIP plan as calculated through the date of the sale
20 transaction.

21 In such circumstance, KEIP participants shall be entitled
22 to the greater of the KEIP payment attributable to such sale
23 transaction or the previously-paid restructuring transaction
24 fee.

25 Two more bullets, Your Honor.

1 As provided in the KEIP plan, in the event of the sale of
2 any division but such sale is less than \$500 million, the
3 EBITDA metric shall be adjusted on a pro forma basis for
4 measurement purposes effective at the time of the divestiture,
5 and all KEIP participants, including those that are terminated
6 as a result of the sale, shall be eligible to receive a
7 restructuring transaction fee based upon the adjusted budget
8 and other metrics relating to a restructuring transaction.

9 And lastly, the bankruptcy court maintains jurisdiction in
10 the event there is a dispute on the terms outlined above,
11 either before, at, or after any payment -- after the time of
12 any payment under the KEIP.

13 So, Your Honor, that's the record. That's the deal. As I
14 was reading through the bullets, I realized I might as well
15 address it in plain English. The deal is as follows, and this
16 is all subject to what I just said. But, basically,
17 previously, the KEIP payment would be paid in full in cash
18 upon either the consummation of a restructuring transaction or
19 a sale transaction. Now, it's paid in part. It's paid up to
20 the threshold, plus an incremental piece. And this gives
21 management the ability to earn the difference basically on the
22 backend. It gives the Creditors' Committee some comfort that
23 each of these KEIP participants won't be leaving immediately
24 after consummation of that, the transaction. That was the
25 basis of the deal.

1 And with that, Your Honor, I would ask the Creditors'
2 Committee to confirm that that has been agreed upon.

3 MR. LEBLANC: Yes, Your Honor.

4 THE COURT: Thank you.

5 MR. SIMON: Before I go into the proffer of Mr. Del
6 Genio which was asked for by the U.S. Trustee, I would just
7 note for the record: This was not an easy deal to get to,
8 Your Honor, and I just want to thank Mr. Zellin from the
9 Committee, Mr. Pulio (phonetic), Mr. Del Genio, Mr. Bospflug,
10 and Mr. Grath (phonetic) for helping move this along very
11 quickly.

12 Just moving along, Your Honor, we'll just proffer the
13 testimony of Mr. Del Genio. As you know, Mr. Del Genio is
14 present in the courtroom, and if called upon to testify, would
15 testify as to the following.

16 PROFFER OF TESTIMONY OF ROBERT DEL GENIO

17 MR. SIMON: Mr. Del Genio is a managing director at
18 FTI Consulting. He currently serves as the chief
19 restructuring officer of the Debtors, and has served in that
20 capacity since March 12, 2019.

21 Prior to the petition date, Mr. Del Genio, along with
22 other members of FTI, certain attorneys from DLA Piper, and
23 Mr. Jamie Hinch, the Debtors' chief administrative officer,
24 compromised a working group to review, evaluate, modify, and
25 ultimately recommend a Key Employee Incentive Plan for PHI.

1 The purpose of the working group and ultimately the
2 purpose of the implementation of the KEIP was to properly
3 incentivize senior management of the Debtors through the
4 Chapter 11 bankruptcy case. Although certain elements of the
5 KEIP have retentive effects, the KEIP is not primarily
6 retentive, and is, in fact, an incentive plan.

7 Through that process, which began in January and
8 culminated in the compensation committee's approval of the Key
9 Employee Incentive Plan on February 20, 2019, the KEIP, as
10 approved by the compensation committee on that date, contained
11 two triggers for payment. Either the consummation of a
12 restructuring transaction or the consummation of a sale
13 transaction.

14 The sale transaction requires a sale of all or
15 substantially all of the Debtors' businesses in excess of \$500
16 million. The restructuring transaction is payable based upon
17 financial metrics, previously net operating cash flow, now
18 EBITDA, between threshold, target, and stretch, and that's
19 based upon the Debtors' financial performance during the
20 relevant period.

21 The KEIP also includes a safety component which can modify
22 the KEIP payments upwards or downwards by 20 percent. Mr.
23 Del Genio would further testify that safety is always an
24 important component of any incentive plan at PHI.

25 Mr. Del Genio would further testify that the metrics

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1 described are difficult to achieve, and it is possible that a
2 sale transaction or a restructuring transaction is triggered
3 but no KEIP bonus would be payable.

4 Since the filing of the motion, Mr. Del Genio was involved
5 in various settlement negotiations with the Committee
6 regarding resolving the Committee's objection to the KEIP,
7 including just prior to and during today's hearing. The
8 settlement as read into the record earlier accurately
9 represents the settlement as agreed upon during this hearing,
10 and Mr. Del Genio would testify as such.

11 This would conclude the proffer of Mr. Del Genio.

12 THE COURT: Thank you, Mr. Simon.

13 Mr. Del Genio, if you would come up and let me swear you
14 in. I believe you may be asked questions, so why don't you
15 just come up all the way to the front, if you would?

16 ROBERT DEL GENIO, DEBTORS' WITNESS, SWORN

17 THE COURT: You may be seated. Did you hear the
18 proffer of your testimony by Mr. Simon?

19 THE WITNESS: I did, Your Honor.

20 THE COURT: And was it true and correct?

21 THE WITNESS: Yes, it was.

22 THE COURT: And if you had been asked questions and
23 given answers, would you have testified the same?

24 THE WITNESS: Yes, I would.

25 THE COURT: Is there anything that you'd like to add

1 to your proffer?

2 THE WITNESS: The only thing I'd like to add is Mr.
3 Simon was involved in this and he deserves some credit as
4 well.

5 THE COURT: I'm sure he appreciates that.

6 Does anyone have any questions of Mr. Del Genio?

7 MS. KIPPES: Thank you, Your Honor. Meredith Kippes
8 on behalf of the United States Trustee.

9 CROSS-EXAMINATION

10 BY MS. KIPPES:

11 Q Good afternoon, Mr. Del Genio.

12 A Good afternoon.

13 Q I have a few questions. Who negotiated the incentive plan
14 on behalf of the Debtors?

15 A The incentive plan was presented by the working group,
16 which was made up of Mr. Simon and members of my team, myself.
17 We also worked with the compensation committee. So, we
18 presented this, and Mr. Hinch was involved from the company
19 side initially because he's the chief administrative officer
20 and very familiar with their historic compensation plans.

21 We then, with the formation of that, a conversation with
22 Mr. Bospflug, who is the president and chief operating
23 officer, about KEIP participants and the structure of this,
24 presented it to the compensation committee. They, like all
25 compensation committees, asked questions, challenged, and we

1 worked through that to ultimately come up with a plan that we
2 were really prepared to present to this Court.

3 Q Okay. Did current management have separate counsel during
4 the negotiations?

5 A They might have, but I don't -- I didn't interact with
6 them, so that, I don't know.

7 Q Do you know whether this -- somebody independent of the
8 Debtor was negotiating the incentive plan on behalf of the
9 current management?

10 A What I would say is that the -- as part of the working
11 group, we had put that together. Mr. Bospflug talked to his
12 management team, and they found this acceptable, knowing that
13 it had to be approved by the Court. So, it was a conversation
14 with them. They understood the provisions of that. They went
15 through that, quite frankly, Mr. Simon and I took questions on
16 that and explained that to members that had some questions,
17 but there was also discussion on that side.

18 The other thing I'd point out is, because the compensation
19 committee, it regularly looks at how their compensation
20 relates to the peer group and does studies on that, that they
21 were pretty familiar with how their compensation worked
22 historically. And then the work we put together with DLA to
23 show what are comparable for KEIPs, they also had the benefit
24 of that, as well as the compensation committee and our
25 judgment on what was market, which I have testified to.

1 Q Okay. Do you think any of the current management would
2 resign if this isn't approved today?

3 A Well, I believe that this KEIP is very important to
4 provide the incentives for management. KEIPs are designed so
5 that you have proper incentives during this process, because
6 what -- there's two things that I think are really important.
7 Is (1) you need to preserve and enhance the value of the
8 company and the estate for the benefit of all the
9 stakeholders; and (2) is they need to focus on providing safe
10 and reliable transportation.

11 KEIPs are designed so management can be focused in the
12 midst of what I would call the Chapter 11 process. And
13 there's a lot of distractions in that process. And what you
14 need to do is you need to design incentives so they know, if
15 they're doing what they need to do, they're going to get
16 properly incentivized, so they're not worried about what their
17 compensation is going to be, they're not going to listen to
18 people who might be talking to them about seeking other
19 offers, which there has been some inbound inquiries. We felt
20 very strongly, and so did the compensation committee, we need
21 to have that in place to, first and foremost, drive those
22 incentives I've talked to, but as Mr. Simon says, there is
23 some retentive aspect to it. And if people are focused on,
24 here's what I need to do, these are what are the incentives in
25 place, and if I do that I will be rewarded, they are less

1 likely to seek other opportunities, or more importantly,
2 respond to other opportunities.

3 Q Okay. Thank you for that. My question was: Do you think
4 any of current management might resign right now? Do you have
5 a sense of that?

6 A Yeah, I -- what I would tell you is I know there have been
7 -- there are certain -- and, again, I'm not going to be
8 specific because --

9 Q That's fine.

10 A -- of the confidential nature of this, --

11 Q Yes.

12 A -- but there have been -- every member of senior
13 management has been approached.

14 Q Okay.

15 A And I believe that this is the -- and I've said this
16 before -- best management team in this industry. They've done
17 a really good job. And these are executives that can work in
18 not only this industry, but other businesses. And I think if
19 they're not taken care of, there's a high likelihood they
20 could seek other employment.

21 Q Do any of them, the incentive plan recipients, have job
22 offers?

23 A They have -- they have been approached.

24 Q They have been approached?

25 A They have been approached by other parties. And I have

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1 talked to Mr. Bospflug and Mr. Hinch about who has been
2 approached. Again, it's confidential, but they are -- one of
3 the reasons that this KEIP is in place is, again, to provide
4 the right incentives and to make sure that they're focused on
5 doing what they're doing. And it's not just my concern. It
6 was a concern of the compensation committee as well.

7 Q Okay.

8 MS. KIPPES: No further questions, Your Honor. Thank
9 you.

10 THE COURT: Thank you, Ms. Kippes. Does the
11 Committee have any questions of Mr. Del Genio?

12 MR. LEBLANC: We do not, Your Honor.

13 THE COURT: Mr. Simon, do you have any follow-up
14 questions?

15 MR. SIMON: Just very brief, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. SIMON:

18 Q Mr. Del Genio, Ms. Kippes asked you whether current
19 management retained separate counsel in connection with the
20 KEIP. How many KEIPs have you seen in your experience, either
21 at FTI or CDG or previously?

22 A It seems like almost every case there's a discussion on
23 KEIP. People at the firm kind of refer to me as the KEIP
24 magnet because I seem to get involved in most of these. So,
25 it's a pretty typical situation for me because it always seems

1 like this is an important issue and I'm the one, a lot of
2 times, that has to deal with it. So, it's -- I'm used to
3 dealing with this.

4 Q Do you find it customary for management to retain separate
5 counsel in connection with the KEIP?

6 A I think it's rare. I merely have seen it on one or two
7 occasions, but they're very rare.

8 Q Certainly not customary?

9 A It is not customary.

10 Q And it doesn't surprise you in this case that that didn't
11 happen, either?

12 A No, I think management usually relies on the professionals
13 that the company retains and what their view is of the KEIP as
14 it relates to the bankruptcy process, both financial and legal
15 professionals.

16 Q Okay. Lastly, Ms. Kippes asked you if you thought
17 management would resign if the KEIP were not approved today.
18 That being a tough question, let me ask you: Is there a risk
19 of any one of the KEIP participants leaving if the KEIP were
20 not approved today?

21 A Yes, I believe there's risk, and that's why the -- one of
22 the reasons. But again, I think the -- what I think is very
23 critical here is a well-designed KEIP with the right type of
24 incentives keeps management focused on what they're doing and
25 less likely to listen or look for other alternative, which is

1 another way of saying it has -- keeps them focused and less
2 likely to leave.

3 Q What do you think the business impact would be to the
4 Debtors if one or more of the KEIP participants left?

5 A It would be very significant. These are experienced
6 executives that are not easy to replace that have worked in
7 this industry, for this company and similar companies, and it
8 would be very difficult to replace. And it would harm the
9 company significantly if these senior members left at this
10 point in time.

11 Q Lastly, did the working group and the compensation
12 committee take all of those factors into account when
13 formulating and implementing the KEIP?

14 A Yes, we did.

15 MR. SIMON: Thank you, Your Honor. Nothing further.

16 THE COURT: Does anyone else have any questions of
17 Mr. Del Genio?

18 You may step down, sir. Thank you.

19 THE WITNESS: Thank you.

20 (The witness steps down.)

21 THE COURT: Anything further on the KEIP motion? Ms.
22 Kippes, were you -- are you satisfied with your objections?

23 MS. KIPPES: Your Honor, I'll take that as an
24 invitation to argue a little bit. Meredith Kippes on behalf
25 of the United States Trustee.

1 As Mr. Del Genio acknowledged, there are retention aspects
2 to this KEIP. This is why we had asked the Court to consider
3 it under the higher standard of 503(c)(1) rather than the
4 lower standard of 503(c)(3). And we maintain that the Court
5 should look at this, since it involves insiders and it does
6 have a retention aspect, that the Court should evaluate this
7 plan under 501(c)(3) and evaluate whether the Debtor has met
8 the standards under 501(c)(3).

9 As the Court knows, it's the Debtors' burden. And if a
10 plan does not require affirmative action -- it does here --
11 beyond that contemplated prepetition, then it's not an
12 incentive plan. There's testimony -- the proffered testimony
13 of Mr. Del Genio suggests that there are metrics in place
14 which would meet the standard. But again, that is for the
15 Court to decide. And we would ask that the Court decide it
16 under Section 503(c)(1) rather than the lower standard of
17 503(c)(3).

18 Thank you.

19 THE COURT: Thank you. Mr. Simon, you get to go
20 last.

21 MR. SIMON: Your Honor, there was uncontroverted
22 testimony. In fact, Ms. Kippes' questions did not address
23 whether this was an incentive plan or a retention plan. This
24 is clearly an incentive plan. We're seeking it under
25 503(c)(3) of the Bankruptcy Code and Section 363 of the

1 Bankruptcy Code. There is a slightly different -- there's
2 some uncertainty in the case law about the proper standard to
3 apply under those sections, either the business judgment rule
4 or some slightly different standard, as highlighted by Judge
5 Lynn in *Pilgrim's Pride*, but in any event we have met those
6 standards.

7 I think it's very important to note that the Key -- the
8 economic participants in this KEIP have now signed off on this
9 KEIP with the deal with the Creditors' Committee. The sole
10 retentive effect that was addressed in the U.S. Trustee's
11 objection was simply that they have to be here in order to be
12 paid. We noted in our reply that's illogical. That doesn't
13 make sense. Because if it -- if that weren't the case, we
14 would actually be incentivizing these employees to leave.
15 Certainly, that's not the law, and that's not appropriate as
16 argued by the U.S. Trustee.

17 This is under 503(c)(3). We have shown that's it's
18 justified by the facts and circumstances of this case. Mr.
19 Del Genio just highlighted the fact that there are
20 solicitation impacts relating to these key participants. This
21 was in the mind of the compensation committee on February
22 20th, and it still is today. And it's important and
23 appropriate and well within the business judgment of the
24 Debtors to implement this Key Employee Incentive Plan, and we
25 believe it is justified by the facts and circumstances.

1 Thank you.

2 THE COURT: Thank you. We'll go to mediation and
3 adjournment, take a short recess, I'll come back and give you
4 a ruling in this one.

5 MR. SIMON: Okay.

6 MR. CALIFANO: Your Honor, we just need five minutes
7 to work out the language for mediation. We just have to work
8 out one term. Is it all right if we take a five-minute break
9 for the mediation? I know we have time constraints.

10 THE COURT: Sure. That'd be fine. Remember that Mr.
11 Levick -- where are you, Mr. Levick?

12 MR. LEVICK: I'm right here, --

13 THE COURT: Yes. Okay.

14 MR. LEVICK: -- Your Honor.

15 THE COURT: Mr. Levick has some issue on mediation
16 that we're going to have to address.

17 MR. CALIFANO: Right. He wants to come, and we don't
18 want him there.

19 THE COURT: I suspected as much. We'll be in recess
20 for five minutes, though, okay?

21 (A recess ensued from 4:11 p.m. to 4:19 p.m.)

22 THE CLERK: All rise.

23 THE COURT: Good afternoon. Please be seated. Thank
24 you.

25 All right. That was actually productive, Mr. Califano.

1 Mr. Simon, the KEIP motion is going to be granted under
2 Section 503(c)(3) and 363. There may be some hint of some
3 sort of retention, but I think that's often the case with
4 KEIPs. But in any event, if you would prepare an order and
5 circulate it, I'll sign it upon receipt.

6 MR. SIMON: Thank you, Your Honor. What I'll do is
7 I'll send a revised plan to the Committee counsel and we'll
8 make sure we have their sign-off on that before.

9 THE COURT: All right. Mediation?

10 MR. CALIFANO: Yes, Your Honor. We have an agreement
11 on a mediation process, Your Honor. And Mr. Dunne or Mr.
12 Khalil can interrupt me if I get anything wrong.

13 THE COURT: I'm sure they will.

14 MR. CALIFANO: Yeah. They didn't need my permission,
15 I guess.

16 All -- the Debtors' disclosure statement is going to be
17 moved to May 29th. The Committee's standing motion is going
18 to be moved to May 29th. We have agreed to a litigation
19 standstill except for two exceptions. The Committee wants to
20 file a motion to terminate exclusivity that will be on for the
21 29th. The Debtors will be filing a motion for cash collateral
22 usage with -- but -- and I've told the Committee counsel we
23 will preview that motion with them.

24 The mediation is to start as soon as possible. Monday, if
25 the mediator is available. We have agreed that, subject to

1 their availability, we can't agree for them, either Judges
2 Houser, Jernigan, Jones, or Isgur, we would be fine with. And
3 we're fine -- we'll leave it with Your Honor to choose. I
4 don't know who you --

5 THE COURT: Uh-huh. I don't know that I can get a
6 sitting judge that soon, Mr. Califano.

7 MR. CALIFANO: But we'll start -- we can start and
8 we'll push -- if we have to push things out further, we'll
9 push things out further. But we're just saying we will be
10 available whenever the mediator is available and as soon as
11 Monday.

12 THE COURT: And let me ask. Why aren't you all going
13 -- why aren't you all actually just going ahead and using a
14 mediator that you can get on board?

15 MR. CALIFANO: Well, honestly, Your Honor, and it's
16 -- I think that based -- and I think Mr. Dunne agrees with me
17 -- I think, based on the tenor of the case, having a judge
18 will encourage people to behave in a better fashion. It's --
19 I mean, I think we're -- we would be -- we would appreciate
20 having a sitting judge in place. We think it would be helpful
21 to the process.

22 THE COURT: All right. I'm just not sure I can
23 accomplish that for you.

24 MR. CALIFANO: No, I understand that, Your Honor.

25 THE COURT: I'll just say that.

1 MR. CALIFANO: I understand that. I understand. And
2 if you want, we can have -- we can do reach-out to the various
3 chambers.

4 THE COURT: Well, why don't you let me react to that
5 first with them. I don't --

6 MR. CALIFANO: Thank you, Your Honor.

7 THE COURT: And then I'll just get back with you all
8 promptly, because I think this does need to be resolved.

9 MR. CALIFANO: The participants -- we suggest the
10 participants in the mediation, at this stage, Your Honor, be
11 the Debtor; Thirty Two, LLC; the Official Committee of
12 Unsecured Creditors; and the Indenture Trustee. We think
13 there are significant enough issues among those constituents
14 that need to be resolved, and then at a further date it may or
15 may not make sense to bring in other participants. But right
16 now, there are a number of issues, and I think we've got to
17 take sort of the main event first and then work our way from
18 there.

19 So, that's -- I know I was kind of flip when I said we
20 didn't want Mr. Levine [sic] there. It's not that. We just
21 really have too much to focus on between the Debtors and the
22 Committee.

23 THE COURT: So, who would be participating in the
24 mediation?

25 MR. CALIFANO: It would be the Debtor; Thirty Two,

1 LLC; the Official Committee of Unsecured Creditors; and the
2 Indenture Trustee. And as I said, Your Honor, a two-week
3 litigation hold except for the motion to terminate exclusivity
4 and the cash collateral motion that'll be filed. And the
5 Debtors' time to respond to the motion to terminate
6 exclusivity will be conterminous with the end of mediation,
7 either successful or when the parties say mediation won't work
8 any further.

9 Did I get it right?

10 MR. DUNNE: You got it right.

11 MR. CALIFANO: Thank you.

12 MR. DUNNE: Your Honor, just a couple of comments
13 from the Committee. And for the record, it's Dennis Dunne
14 from Milbank.

15 We support mediation. We think it's time. I think what
16 you saw with us today on the KEIP is an example of what can be
17 accomplished when we get the requisite information, full
18 engagement from the Debtors, and people are trying to draw
19 towards a solution. And I agree that we should put down the
20 litigation cudgels for a few weeks and see where we can get
21 to.

22 With respect to the sitting judge request for mediator, I
23 just -- frankly, I just found myself, and this is anecdotal,
24 and, you know, the plural of anecdote is not data, so it's
25 just anecdotal -- which is that I've had better success with

1 sitting judges in the past few years, or recently retired
2 judges, and would love to take a shot at that in this case
3 because we'd love to try to get something done in the next
4 month.

5 And I think, as Mr. Califano was saying before about some
6 of the rancor, part of what we've been reacting to is what I
7 think has been the out-of-sequence. You had the plan filed
8 and now we're going to go do the negotiations. Let's put that
9 behind us and let's do the negotiations and let's hope we're
10 here at the end of May with good news and that we don't have
11 to worry about all that other litigation that'll pop up on the
12 29th.

13 THE COURT: Thank you.

14 MR. CALIFANO: Thank you, Your Honor.

15 THE COURT: All right. So, on a mediator, my
16 intentions would be to make an inquiry and try to get back
17 with you all, maybe as soon as tomorrow on that.

18 MR. CALIFANO: Okay.

19 THE COURT: So you can react to that.

20 MR. CALIFANO: As you know, I'll be in town for a
21 couple of days.

22 THE COURT: We're glad to have you. All right. Let
23 me hear Mr. Levick's comment.

24 MR. LEVICK: Good afternoon, Your Honor. I'm kind of
25 used to people not wanting me around, so I didn't find that

1 offensive. As you know, I represent Christina Wray in a
2 putative class of class action plaintiffs who were former
3 customers of the Debtor. In other words, they used the air
4 ambulance service.

5 This motion was filed on Friday. I conferred with the
6 Debtor. Mr. Califano is correct: They didn't want to invite
7 my putative class or the counsel for the putative class. The
8 Committee didn't really have an opinion on whether we could
9 attend or not, but they thought, if push come to shove, they
10 might not want us there, either.

11 But let me give you a quick background, Your Honor. As
12 recently as Friday, this past Friday, on ABCnews.com, there's
13 been another big news story about the air ambulance industry
14 and its controversial financial collection practices. As you
15 know, someone may be taken by an air ambulance and they're not
16 conscious and there's no contract, and before they know it
17 they're handed a bill for between \$50,000 and \$60,000, Your
18 Honor. And Mr. -- the Debtors' rep; I'm sorry, I have his
19 name right here -- Del Genio testified at the 341 meeting last
20 Friday that the reasonable or average cost of that should be
21 about \$10,000, \$11,000, or \$12,000. Well, that's the point of
22 the putative class action claimants.

23 It's unusual in this case, Your Honor, because the class
24 is not owed money, the class actually owes money to the
25 Debtor, but this class has been described as financially

1 crippled. After going through all of this physical harm,
2 they're having their financial lives ruined by air ambulance
3 companies. And I'm here to try to help them and maybe put a
4 stop to this or to come up with something reasonable.

5 So, here we are in this situation, and we're weighing our
6 options, Your Honor. We have a pending case in Arizona. Do
7 we file a motion for relief from stay to continue that? Do we
8 file some kind of cause of action in this Court that may try
9 to stay some of the collection practices until this Court or
10 another court can determine what the reasonable value of such
11 a service is? Because, remember, there's no contract.

12 To establish a reasonable value of these services can help
13 the Debtor, Your Honor, and the reason is because they're
14 trying to collect also from insurance companies. The issue of
15 what is collectable from the putative class is very important
16 to feasibility in the plan, to collections in the plan, but
17 it's also important, you know, for humanity, to try to do
18 something for these thousands of people that are being
19 harassed and think that their financial lives have come to an
20 end.

21 So, I think there is a chance to do the right thing and to
22 maybe end this litigation in Arizona and not have to file
23 something in this Court that's going to turn out to be very
24 expensive and time-consuming. Here we are on basically one
25 hearing, one contested hearing today, and look at all the

1 attorneys that showed up. I am a big believer in mediation.
2 I've had mediation get me out of a lot of jams, and I think
3 that -- I'm glad to see that these parties are going to
4 mediation. We just want a seat at the kids' table. We will
5 only speak if spoken to, Your Honor. We realize that while we
6 may think we're the big fish, we're not exactly the big fish
7 at this mediation, but it is such an unusual issue and it
8 looks like you're going to get an all-star mediator, I think
9 we take advantage of that if there's the chance, and we sit
10 down there, and when they have time for us, we'll pipe up, and
11 maybe we can reach a deal on this issue that is crucially
12 important to thousands of people.

13 So, I know this motion was filed Friday, and here I am on
14 Monday, but I am asking for a seat at the table.

15 Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Levick. One more right
17 behind you, Mr. Califano.

18 MR. GOLUBCHIK: Good afternoon, Your Honor. David
19 Golubchik; Levene, Neale, Bender, Yoo & Brill; for the other
20 Official Committee of Equity Security Holders.

21 The Equity Committee was just formed late on Thursday, and
22 I reached out to Debtor -- Committee counsel. I won't use the
23 kids' table, but I'll use the sandbox analogy, kind of can we
24 play in the sandbox with you, and I guess the message is not
25 enough sand in the sandbox.

1 We have a case that started with about half a billion
2 dollars in equity, presumably creditors in the money, the
3 issue is Equity Committee. We have the U.S. Trustee forming
4 the Equity Committee. So, there's some view that equity has
5 an interest in this case. And the day after the Equity
6 Committee was formed, I guess the Debtor filed a valuation
7 that says the assets are worth or the company is worth about
8 half a billion dollars. So, not only is equity out of the
9 money, but that creditors are partially out of the money.

10 It's an important issue, and based on the Debtors' motion,
11 the goal here is to minimize litigation and focus on
12 resolution of the case. So far, the Committee has been
13 handling the laboring oar of the litigation. It only seems
14 appropriate that the Equity Committee appointed by the U.S.
15 Trustee should be part of this process, rather than engage in
16 litigation while these guys are working on a mediation. So,
17 we're here telling the Court that we believe the Equity
18 Committee should be part of the process.

19 THE COURT: Thank you.

20 MR. CALIFANO: Your Honor, what we do -- what we work
21 out with the Official Committee of Unsecured Creditors isn't
22 going to be binding on any other creditor. Okay. We have
23 serious issues with the Official Committee, as you've seen
24 from the beginning of this case, and we think we can resolve
25 them. But we think it's best if the main players be focused.

1 Now, the class action, it's an uncertified class of people
2 who say they owe less money to us than we say they owe.
3 Completely inappropriate. They can be dealt with. If they
4 want to make a motion for relief from stay, litigation hold
5 doesn't want to -- doesn't apply to them. If they want to
6 make -- file a class action proof of claim, I'll welcome that.

7 With respect to the Equity Committee, Your Honor knows our
8 belief about the Equity Committee. There isn't anything here
9 for equity. Okay. I think the clearest indication of that
10 was that Mr. Gonsoulin, who owns a big chunk of equity, walked
11 away from his equity and his only participation is on his
12 secured claim. That has issues, but it's pretty clear -- and
13 Houlihan filed a valuation where the midrange was \$480-some-
14 odd million. And we know that the debt here is greater than
15 that.

16 We need to focus on the main event, and the main event is
17 resolving the issues that we have with this Unsecured
18 Creditors' Committee, which represents the majority of the
19 debt here in this case. It's been tough enough to get here,
20 to get to the point where we're talking about a mediation. We
21 can't have it complicated by other participants who have much
22 smaller stakes, if any stake at all.

23 Now, we're not going to be able to make a deal that binds
24 the equity or binds this putative class, but we have our own
25 issues to work out, Your Honor, that will only be complicated

1 by having these other participants. We chose the participants
2 because those are the ones we need to resolve the litigation
3 that is in front of us.

4 One thing, and I'm sure Mr. Dunne will speak for himself,
5 but one thing we do agree on is that we need our clients and
6 Thirty Two, LLC in the room talking. It's not going to end
7 this case. There's other constituents to deal with who will
8 be dealt with in due course. But we need to resolve these
9 issues with our main constituents, and then -- before we can
10 go forward, or else there's nothing in here for anyone and
11 this case becomes a morass. We'll deal with those people
12 before we confirm a plan. We'll deal with them as part of the
13 process. But right now, we need to focus on the main
14 antagonist.

15 Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. DUNNE: Your Honor, it's Dennis Dunne on behalf
18 of the Official Committee.

19 I agree that we should narrow the list of attendees at
20 mediation for now, for a few reasons. Principally, we -- I'd
21 like to focus on maximizing the chance that we have success
22 between and among the Debtors and, you know, the Official
23 Committee and the secured creditors, and recognizing that then
24 we may have to engage others as we move that deal forward.

25 I've also been involved in too many mediations where

1 additional parties quickly become ancillary and they end up
2 just sitting in a conference room while the mediator has
3 concluded what we've concluded, that he or she should spend
4 the bulk of his or her time focused on trying to get a deal
5 between the Debtors and the Official Creditors' Committee, and
6 then all we've done is kind of run up the cost to the estate
7 by have other estate representatives sit there.

8 With respect to the class action question, I don't think
9 that those issues there are right for this mediation that
10 we're talking about, in terms of the capital structure and the
11 balance sheet of Reorganized PHI. And with the Equity
12 Committee, we all recognize that if we get to a deal we'll
13 have to turn around and figure out a way to deal with them or
14 address their concerns otherwise.

15 Thank you.

16 THE COURT: Thank you.

17 MR. GOLUBCHIK: Just briefly, Your Honor. I guess
18 what -- to me, what Mr. Califano says just makes no sense.
19 First of all, Mr. Gonsoulin is giving up equity. Under the
20 insider plan, he gets a lot more of the equity, so I've got
21 that deal. But how the creditors are treated directly affects
22 equity. We have a priority scheme, a waterfall. So, I don't
23 think you can have one without the other.

24 Of course, the possibility is the Debtor, creditors, get
25 together, work out a plan that makes sense, and basically cut

1 the bottom off. That's exactly why the Equity Committee
2 should be -- an Official Equity Committee should be part of
3 the process.

4 THE COURT: Thank you. I said I didn't want to take
5 another recess, but let me take just a real quick one. We'll
6 come back and talk about that.

7 (A recess ensued from 4:37 p.m. to 4:39 p.m.)

8 THE CLERK: All rise.

9 THE COURT: Please be seated. Thank you.

10 On the mediator, I still think that a private mediator is
11 what you're going to end up with, maybe a former judge, but
12 I'll at least ask the four. I kind of know what is happening
13 in at least two of their lives. And I'll get back to you all
14 tomorrow.

15 I think the Official Committee of Equity needs to
16 participate in this process. They were just formed. It may
17 very well be that they're out of the money, but I do think
18 that, to fulfill their fiduciary duty to their constituents,
19 they need to attend.

20 The putative class action, I think, does not participate
21 in this mediation.

22 And I'll get back with Mr. Califano and Mr. Dunne tomorrow
23 just on the answer on the mediator.

24 On Houlihan, we actually need to write something up. I
25 can do this by CourtCall tomorrow at 9:00. I think some of

1 you are actually going to be here for hearings. So you can
2 just register by CourtCall. I'm going to give you a ruling at
3 9:00 o'clock tomorrow morning. All right.

4 MR. CALIFANO: Thank you, Your Honor.

5 THE COURT: Thank you very much.

6 (Proceedings concluded at 4:40 p.m.)

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CERTIFICATE

20 I certify that the foregoing is a correct transcript from
21 the digital sound recording of the proceedings in the above-
entitled matter.

22 **/s/ Kathy Rehling**

04/30/2019

23

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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Exhibit “B”

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

PHI, Inc., *et al.*,¹

Debtors.

Chapter 11

Case No. 19-30923-hdh-11

(Jointly Administered)

**ORDER (I) AUTHORIZING THE DEBTORS
TO IMPLEMENT KEY EMPLOYEE INCENTIVE PLAN AND
(II) GRANTING RELATED RELIEF**

This matter coming before the Court on the Motion² filed by the above-captioned debtors (collectively, the “Debtors”) seeking approval and implementation of the Debtors’ KEIP and

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: PHI, Inc. (5707), PHI Air Medical, LLC (4705), AM Equity Holdings, L.L.C. (0730), PHI Tech Services, Inc. (5089) and PHI Helipass, L.L.C. (4187). The corporate headquarters and the mailing address for the Debtors listed above is 2001 SE Evangeline Thruway, Lafayette, LA 70508.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

granting related relief; the Court having reviewed the Motion; all as more fully set forth in the Motion; and upon consideration of the First Day Declaration, the Del Genio Declaration, the testimony in support of the Motion, and the announcement and the reading into the record of an agreement between the Debtors and the Official Committee of Unsecured Creditors during the April 29, 2019 hearings; and this Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing were adequate and appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and this Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth below.
2. The KEIP, as described in Exhibit A to the Motion, is hereby approved subject to the following modifications, which were announced in open Court and read into the record as the agreement between the Debtors and the Official Committee of Unsecured Creditors:

- The Net Operating Cash Flow metric will switch to an EBITDA metric based on the Debtors' 2019 Business Plan, provided that \$35 million of EBITDA will be the "Threshold" metric, which Threshold will be adjusted based on the timing of the Restructuring Transaction.
- Restructuring-related professional fees will not be included in the EBITDA metric, and all EBITDA targets will be net of all amounts payable under the

KEIP.

- Payments under the KEIP are to be paid in all cash; provided, however, that solely at each KEIP Participant's option and discretion, with such notice to be provided no later than two weeks prior to the proposed effective date, a portion of the KEIP payment may be converted from cash to new equity in the reorganized Debtor at plan value consistent with past practices.
- Upon the consummation of a Restructuring Transaction, the maximum aggregate -- i.e., for all Debtor KEIP Participants -- payout in cash, if earned, will be equal to the sum of (1) the Threshold bonus, or \$3,182,567; (2) fifty percent equal to the incremental difference between the Threshold bonus and the Target bonus, which is equal to \$530,428; and (3) a twenty percent safety bonus on a prorated basis based on timing from January 1, 2019 through the date of a Restructuring Transaction.
- On December 31, 2019, the Company's overall performance will be measured based on the KEIP metrics, as modified by this Order, with the Company to pay, at the time the Annual Incentive Plan payments are made, consistent with past practices, the incremental difference in cash, up to the maximum amount contemplated by the KEIP.
- All cash payments made upon the consummation of a Restructuring Transaction shall be accrued, earned, payable, and not subject to clawback, subject to the following: if any KEIP Participant leaves before the later of (1) when the Company pays amounts due at the time the Annual Incentive Plan payments are made, consistent with past practices; or (2) April 1, 2020, there is a full clawback of (a) fifty percent of the incremental difference between the Threshold bonus and the Target bonus, in an amount not greater than \$530,428, to the extent actually paid; and (b) the prorated Safety Bonus, to the extent actually paid; provided, however, that if the KEIP Participant is terminated without cause, there is no clawback, and if the KEIP Participant is constructively terminated, and that term will be agreed upon by the Company and the Official Committee of Unsecured Creditors, there is no clawback.
- As provided in the KEIP, the KEIP Participants may be entitled to receive payment under the KEIP for multiple Sale Transactions; provided, however, that in the event that a Sale Transaction occurs in conjunction with a Restructuring Transaction, the KEIP Participant shall only be entitled to receive one payment equal to the greater of the KEIP payment attributable to such Sale Transaction or the Restructuring Transaction Fee for the entire transaction. And a Sale Transaction that occurs post-emergence shall not give rise to any payments under the KEIP unless such Sale Transaction would result in payments greater than amounts payable under the KEIP as calculated through the date of the Sale Transaction. In such circumstance, KEIP Participants shall be entitled to the greater of the KEIP payment attributable to such Sale Transaction or the previously-paid Restructuring Transaction Fee.

- As provided in the KEIP, in the event of the sale of any division but such sale is less than \$500 million, the EBITDA metric shall be adjusted on a pro forma basis for measurement purposes effective at the time of the divestiture, and all KEIP Participants, including those that are terminated as a result of the sale, shall be eligible to receive a Restructuring Transaction Fee based upon the adjusted budget and other metrics relating to a Restructuring Transaction.
- This Court will maintain jurisdiction in the event there is a dispute on the terms outlined above, either before, at, or after any payment -- after the time of any payment under the KEIP.

3. To the extent there is any inconsistency between the KEIP and this Order, this Order shall govern.

4. The Debtors are further authorized to take any and all actions as may be necessary, desirable or appropriate to effect, implement, and/or consummate the KEIP as modified by this Order, including without limitation, making the payments that may become due thereunder, without further application or order of this Court.

5. All amounts earned and payable under the KEIP as modified by this Order shall have administrative expense priority under sections 503(b) and 507(a)(2) of the Bankruptcy Code for all purposes in these chapter 11 cases and in any other cases under the Bankruptcy Code to which these cases may convert.

6. This Court shall retain jurisdiction over all matters set forth in the Motion, including the entitlement of any party to any payment pursuant to the KEIP as modified by this Order.

End of Order